TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No 263.

MUTUAL RESERVE FUND LIFE ASSOCIATION, APPELLANT,

vs.

JAMES S. PHELPS AND FIDELITY TRUST AND SAFETY VAULT CO.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED MARCH 5, 1903.

(18,437.)

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Proceedings of the circuit court of the United States for the district of Kentucky at a regular term begun and held at the Federal court hall, in the city of Louisville, on Monday, October 1st, A. D. 1900.

Present: Hon. Walter Evans, sitting as circuit judge.

MUTUAL RESERVE FUND LIFE ASSOCIATION, Complainant,
vs.
JAMES S. PHELPS ET AL., Defendants. } No. 6821.

Be it remembered, that heretofore, to wit, on the 23rd day of August, A. D. 1900, came the complainant, by counsel, and filed in the clerk's office of our said court, its bill of complaint, in the above-styled cause.

And on the same day, to wit, on the 23rd day of August, 1900, the following order was entered:

This day came the complainant, by Pirtle & Trabue, its counsel, and moved the court for a temporary injunction and restraining order against the defendants as prayed for in its bill of complaint. Came also the defendants, James S. Phelps and The Fidelity Trust and Safety Vault Company, by Zack Phelps and B. F. Washer, their counsel, and entered their appearance to said motion.

It is ordered that said motion be set for hearing August 25th, 1900.

The bill of complaint above referred to is as follows:

The bill of the Mutual Reserve Fund Life Association filed in the United States circuit court for the sixth circuit and district of Kentucky against James S. Phelps and the Fidelity Trust and Safety Vault Company.

To the judges of the United States circuit court for the sixth circuit:

Humbly complaining, your orator, The Mutual Reserve Fund Life Association, showeth unto your honors:

2 1. That it is a corporation duly organized under and pursuant to the provisions of the statutes and laws of the State of New York, with its principal office in the city of New York, in the State of New York, and a citizen of said State of New York; and that the defendant, James S. Phelps, is a citizen of the State of Kentucky, and an inhabitant and resident of the district of Kentucky, and the defendant, The Fidelity Trust and Safety Vault Company, is a corporation created by an act of the General Assembly of the Commonwealth of Kentucky, with its principal office in the city of Louisville, in said district of Kentucky, and is a citizen of Kentucky, and an inhabitant of the district of Kentucky.

2nd. That the amount in dispute between the complainant and

the defendants in this suit exceeds the sum or value of two thousand dollars, exclusive of interest and costs.

3. That your orator is a corporation duly created and organized under chapter 267 of the Laws of 1875, of the State of New York, and chapter 175 of the Laws of 1883, of the State of New York, for the purpose of, and it has at all times been carrying on the business of life insurance upon the mutual, co-operative or assessment plan, deriving its revenue solely from the voluntary donations of its members, and issuing to its members certificates of membership under and by virtue of which, and under and subject to the articles of incorporation and the constitution or by-laws of the association, certain benefits may accrue to such members.

That long and prior to October 10th, 1899, your orator had complied with the laws of the Commonwealth of Kentucky in such cases made and provided for carrying on in the said State its business authorized by its aforesaid articles of association, and had thereafter obtained in said State as certificate or policy holders and members a great many persons holding certificates in divers amounts, in some instances exceeding the sum of ten thousand dollars, which certificate-holders of your orator in order to maintain in full force and effect said certificates, paid to your orator at stated periods in each year certain dues and assessments made upon the holders of said certificates to raise money to pay death losses accruing under simi-.ar certificates upon the death of members respectively, and that such payments on and immediately prior to the 10th day of October, 1899, accruing to your orator by virtue of the terms of such certificates exceeded the sum of fifty thousand dollars per annum.

That on said October 10, 1899, the insurance commis-
3 sioner of the State of Kentucky cancelled the license which had been theretofore issued by said State to your orator to carry on the business in the State of Kentucky, and gave written notice to your orator that from and after that date all authority granted by his department to your orator and all licenses issued by him to the agents of your orator to do business in the State of Kentucky, were thereby revoked; and from and after said date, namely, October 10th, 1899, your orator has had no agents or agent in the said State of Kentucky, and has not been permitted by the laws, or the insurance commissioner of the said State, to have any agent in the said State to do any business whatever therein, and has done no business whatever in said State of Kentucky; but at one time, for the convenience of those holders of certificates aforesaid who reside in Jefferson county, State of Kentucky, although its certificates of membership provide that the dues and assessments payable thereunder shall be paid to your orator at its home office in the city of New York, has permitted them either to remit dues and assessments directly to your orators at its home office in the city of New York aforesaid, or through the Western bank located in the city of Louisville aforesaid.

4. That the defendant, The Fidelity Trust & Safety Vault Company, assuming to be the receiver appointed by the Jefferson circuit court of Jefferson county, State of Kentucky, has given to all persons

known to said company holding the certificates of membership aforesaid, a notice in writing advising them that it has been appointed receiver in Kentucky of all the business and assets of your orators, and requiring them to pay to it all premiums, dues and assessments which they may owe, or which may hereafter become due to your orator from them until ordered by the court to the contrary, and warning the said holders of such certificates that any payment of any such sums to your orator would make them liable to another payment of like sum to said company giving said notice, as well as subjecting the payors to punishment by the said Jefferson circuit court for contempt consisting in disobedience of its orders.

Your orator shows unto your honors that there is no sum whatever due or owing from the said holders of said certificates, or any of them, to your orator, and that there was no such sum due or owing when said notice was given by the said defendant to the holders of said certificates or when the said court assumed to appoint said defendant receiver as aforesaid, but that all payments of such dues or
4 assessments provided in the certificates held by such members, or by the constitution or by-laws of your orator, are optional with said certificate-holders, and necessary to preserve and keep alive their rights under such certificates; but that nevertheless the said notice and threats of the said defendant to the said certificate-holders is demoralizing and alarming them, and causing them to fear punishment by the said Jefferson circuit court if they pay said dues and assessments to your orator, and is thereby deterring them from making such payments, and from preserving and keeping alive their valuable rights existing under their certificates, to the irreparable damage and injury of your orator and the holders of its certificates aforesaid.

5. That the said defendant, The Fidelity Trust & Safety Vault Company, is no receiver of said court, nor any other officer thereof, because the said court has no jurisdiction of your orator in the case in which it assumed to appoint said defendant company its receiver, but that the defendant, James S. Phelps, on the ordinary docket of said court file- his petition naming your orator as a defendant, praying judgment against your orator that he might recover back certain sums of money which he has paid to your orator aggregating the sum of $1994.20, and causing a summons to be issued upon the said petition on or about the 28th day of February, 1900, which summons could not be served in the said State of Kentucky, because of the previous action of the insurance commissioner of said State in cancelling the license which had been issued to your orator to do business in said State, and revoking a copy of the said summons to be delivered to one B. Frese, a man unknown to your orator, but who your orator is informed is in some way connected with the said Western bank, through whom, as aforesaid, the holders of certificates were, at one time permitted to transmit to your orator the dues and assessments provided for in their certificates, but who was not then, and never was, an agent or officer of your orator, and caused another copy to be delivered to the insurance commissioner of Kentucky, who, while your orator was permitted to transact its business

in Kentucky, had been appointed its agent for service by a certain power of attorney, which, however, had been revoked and annulled long prior to the attempted service upon said insurance commissioner aforesaid; wherefore said alleged service of the said summons was void and of no effect. Your orator further shows that after the delivery of said copy of said summons to said Frese and said insurance commissioner, the said court, acting upon the
5 assumption that your orator had been summoned as a defendant in said action and made default, rendered, on the 19th day of May, 1900, a judgment without trial of the merits of the claim made by the said Phelps against your orator, your orator never having appeared in said action, or been served with process therein, that the said Phelps recover of your orator the said sum of $1994.20 with certain interest thereon, aggregating on the 18th day of May, 1900, $2360. That thereafter, to wit, May 21st, 1900, a writ of *fi. fa.* issued from the office of the clerk of said court directed to the sheriff of said county, commanding him to make out of the estate of your orator the said sum, with costs of such action, and that afterward, to wit, June 12th, 1900, the plaintiff's attorney in said action placed upon the said execution a direction in these words: "The sheriff is directed to return this *fi. fa.* in accordance with the facts, June 12th, 1900," and that on the said day the sheriff returned the said writ to the office of said clerk endorsed "No property found out of which to make this *fi. fa.* or any part thereof."

That afterward, to wit, August 4th, 1900, the said Phelps filed in the said court a paper-writing bearing the style of said case, and entitled "Amended and supplemental petition," reciting the facts aforesaid, and averring that your orator then was, and for more than fifteen years next preceding had been, issuing policies of life insurance, for which it received dues, premiums and assessments and had been engaged in such business in Kentucky and that in December, 1899, the insurance commissioner of Kentucky had cancelled the authority of your orator to issue new policies, or make new contracts, and that thereafter your orator withdrew from Kentucky all its agents and employés. That prior to December, 1899, policyholders in Kentucky paid all moneys due your orator to local collectors and treasurers in said State, and that after December your orator revoked their authority to longer receive anything of value belonging to your orator, and instructed all of the said policy-holders and your orator's debtors in Kentucky to forward directly to its home office in New York whatever they owed, or might owe, to your orator; and that all this was done pursuant to a fraudulent scheme of your orator, which scheme the said Phelps assumed to set out in detail too elaborate here to repeat. Wherefore the said plaintiff prayed a decree in aid of, and in the enforcement of, his so-called judgment and a general attachment of your orator's property, and that all persons connected with your orator appear before the
6 commissioner of said court and disclose all of its property or equitable interests, or, if said court should deem proper, a receiver be appointed to take charge of the business assets and property, of your orator in Kentucky, or which it might obtain in Ken-

tucky, and that all revenues and incomes accruing to your orator from policy-holders or other debtors be ordered paid to said receiver.

That no process issued upon the said paper, and that your orator has never appeared thereto, but that immediately upon its being filed in said court, said court, without any notice to your orator, or to any of its agents or officers, or anybody who even assumed to represent it, promulgated an order appointed the Fidelity Trust and Safety Vault Company a receiver of all the assets and estate of your orator in Kentucky, and ordered it to collect and receive all moneys, debts, things in action and credits then owing, or thereafter accruing to your orator, and to take and hold any and every interest, privilege, or franchise which your orator might then own or thereafter acquire, and to take possession of all the revenue and income which might accrue, or that might thereafter accrue to your orator from its business in said State and from its policy-holders and specifically directed all persons insured in your orator, and all its debtors in Kentucky, to pay to said so-called receiver all dues, premiums and assessments, and whatever else of value might then or thereafter be or become owing or due to your orator; and warned all persons or policy-holders that any disobedience on their part of said order, or failure to comply with the provisions thereof, should make them liable to summary proceedings and punishment for contempt, &c., &c.

6. That there are largely over one thousand holders of the aforesaid certificates of membership residing in Kentucky whose certificates represent over three millions of dollars, and that the defendant company is threatening to, and unless restrained and enjoined by the order of this court will, institute actions against said certificate-holders, or otherwise proceed against them to collect and obtain the dues and premiums and assessments which they would pay to your orator under the terms of the said certificates, the payment whereof is essential to preserve and keep alive their rights and the insurance evidenced by the said certificates, that the premiums, dues and assessments payable to your orator from its members in Kentucky on or before August 31, 1900, aggregate many thousands of dollars, and that the action of defendants would prevent your orator's receiving such
7 dues, premiums and assessments, aggregating largely exceeding two thousand dollars exclusive of interest and costs, and that the injury and damage which would accrue to your orator, unless the injunction herein prayed be granted, would largely exceed the sum of two thousand dollars, exclusive of interest and costs; that the institution by the said receiver of actions or other proceedings against the said certificate-holders in Kentucky would cause and create an enormous amount of costs, and unnecessary and unjustifiable waste of the money which would otherwise be paid to your orator, and that an injunction issued by your honors is indispensable to prevent a multiplicity of such actions and waste of the moneys which would be paid to your orator as aforesaid, and the annoyance and harrassing of the said certificate-holders.

That your orator is engaged in business in many States of the United States and is — possession of a large surplus, and is collecting a very large revenue from such dues, premiums and assessments, and that such revenue is indispensable to enable it to maintain its organization and to fulfill and perform the obligations of its certificates of membership; and the confidence of its certificate-holders and of the public is indispensable to enable it to carry on business and to perform its obligations; and that the multiplicity of suits by the so-called receiver and his repeated assertion of the right to collect from such certificate-holders dues, premiums and assessments *in* inspiring *to* the public and the holders of the certificates of membership aforesaid a lack of confidence in the stability and financial strength of your orator and its methods of business, and ability to perform its contracts, and is thereby degrading it in the estimation of the public and of its members, and producing to it great and irreparable injury and damage.

7. Your orator has appeared specially in the Jefferson circuit court in the case or proceeding based upon the so-called amended and supplemental petition, for the sole purpose of filing its petition and bond for removal of, and for removing the said case or proceeding to this court, and tendered its said petition and bond for removal, but the said court has refused and declined to permit that your orator even to file the said petition and bond for removal, and declared that your orator had no right to file the said petition or bond, and that said court would retain jurisdiction of said case; said petition shows the diverse citizenship of your orator and the defendants aforesaid; that the amount in controversy ex-
8 ceeds, exclusive of interest and costs, two thousand dollars, and otherwise conforms to the laws of the United States. Copies of said petition and bond are exhibited herewith and made a part of this bill; and your orator shows that nevertheless, and notwithstanding any power which could possibly have been derived by the said receiver from the order of the said court, if any, would instantly have ceased upon the presentation of the said petition and bond the said receiver is still threatening to collect the dues, premiums and assessments aforesaid, and to take possession of the property and assets of your petitioner, and to cause the said certificate-holders to be punished by the said court as for contempt and disobedience of its orders if they should pay to your orator such dues, premiums and assessments.

8. That unless the said dues, premiums and assessments which the said so-called receiver is threatening to collect, the payment whereof to your orator is forbidden by the so-called order of the said Jefferson circuit court under penalty of punishment for contempt of court in disobedience of its orders and processes, be paid to your orator when payable according to the terms of the certificates of membership, which said dues, premiums and assessments will begin to mature and be payable on or before the first day of September, 1900, your orator will be deprived of the revenue and income which would otherwise accrue to it, and which is necessary to enable it to maintain its organization and to perform its obligations to such certifi-

cate-holders, and the said certificate-holders will be deprived of their interests and property in and under the said certificates and be without any means or ability to preserve or save the valuable interests and property for which they have been paying in said dues, premiums and assessments in the past; whereby the property of your orator and the said certificate-holders would be taken by the said State court through the instrumentality of the so-called receivership without due process of law, in violation of the provisions of the fourteenth amendment to the Constitution of the United States.

Your orator exhibits with this bill as a part thereof, duly certified copies of the proceedings consequent upon the said amended and supplemental petition including the said paper, and also certified copies of the record in said case of James S. Phelps against your orator, in which the said Jefferson circuit court assumed to render a judgment against your orator as aforesaid, so that there is exhibited herewith certified copies of all the proceedings which
9 the said Phelps took in said State court against your orator; and your orator also exhibits as part of its bill the circular which the said receiver sent as aforesaid to your orator's members in Kentucky, marked Exhibit X.

In consideration whereof, and forasmuch as your orator is remediless in the premises at and by the strict rules of the common law, and is only relievable in a court of equity, where matters of this kind are properly recognizable and relievable.

Your orator prays the aid of this honorable court, and that it may please your honors to grant unto your orator a writ of injunction commanding the said defendants, and each of them, and all persons claiming to act under their authority, or the authority, direction or control of either of them, to absolutely desist and refrain from taking possession of or in anywise interfering with, any of the assets or estate of your orator in the State of Kentucky, and from collecting or receiving any moneys, things in action, credits, income or revenues now owing to or hereafter to accrue to your orator, and especially the dues, premiums and assessments payable to your orator by its members by virtue of the terms of their certificates of membership, and from taking or instituting any action or other proceedings against said members, or any of them, to collect or realize such dues, premiums or assessments, or to prevent them, or any of them, from paying over to your orator, according to the stipulations and provisions of their certificates of membership, all dues, premiums and assessments payable according to the tenor thereof, until otherwise ordered by your honors; and that upon final hearing the injunction herein prayed be made perpetual.

And it may please your honors to grant unto your orator a subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to the said James S. Phelps, and The Fidelity Trust and Safety Vault Company, the defendants, respectively, commanding them, on a day certain therein to be named, and under a certain penalty, to be and appear before this honorable court, then and there to answer, but not under oath, answer under oath being hereby expressly waived, all and singular

the premises, and to stand to, perform and abide by such order, direction and decree as may be made against them in the premises as shall seem meet and agreeable to equity and good conscience.

10 And your orator, as in duty bound, will ever pray, &c.

GEORGE BURNHAM, JR.,
S. T. TYNG,
PIRTLE & TRABUE,
Counsel for Complainant.

Edmund F. Trabue, being duly sworn, says he is one of complainant's counsel, and its officers and agents are all absent from this district; that the averments of the bill based on records are true, and the other averments on information he believes to be true.

EDMUND F. TRABUE.

Subscribed and sworn to before me this 23rd day of August, 1900.

THOS. SPEED, *Clerk.*

Upon which bill of complaint there issued the following process:

The President of the United States of America to James S. Phelps & The Fidelity Trust & Safety Vault Company, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America, for the district of Kentucky, at the Federal court hall in the city of Louisville, on the first Monday in October next, to answer a bill in equity exhibited against you in our said court, by the Mutual Reserve Fund Life Association, which you shall in nowise omit, under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court hereto affixed, at the clerk's office of said court, in Louisville, this 23rd day of August, A. D. 1900, and in the 125th year of our Independence.

Attest:

THOS. SPEED,
C. C. C., K. D.,
By HENRY F. CASSIN,
His Deputy.

MEMORANDUM.—The defendants are to enter their appearance in the suit in the clerk's office on or before the 1st day of October next, the day at which the writ is returnable, otherwise the bill may be taken *pro confesso.*

[SEAL.]

THOS. SPEED, *Clerk,*
By HENRY F. CASSIN,
His Deputy.

11 Upon which the marshall made the following return:

Executed on the Fidelity Trust & Safety Vault Co. by delivering a true copy to John Stites, president, this Aug. 28, 1900; on Jas. Phelps, by delivering a copy to him this Sept. 18, 1900.

A. D. JAMES, *U. S. M.*,
By M. C. JAMES, *D. M.*

And on another day of said term of said court, to wit, on the 25th day of August, A. D. 1900, the following judgment was entered:

The parties this day appeared, by their counsel of record, and the motion of the complainant for a temporary injunction and restraining order coming on to be heard, the complainant read in support thereof the bill and exhibits and the affidavits of Chas. K. Lehrberg and Ely D. Graff, and the defendants read a stipulation in writing signed by counsel of the parties respectively, and the matter was thereupon argued by counsel, and upon consideration thereof, and being fully advised, the court delivered an opinion in writing, which is ordered to be filed, and pursuant thereto it is ordered, adjudged and decreed that, pending the final determination of this cause, or until the further order of the court herein, the defendants, James S. Phelps and The Fidelity Trust and Safety Vault Company, and all its officers and agents, are severally hereby enjoined and restrained from collecting or attempting to collect and from reducing or attempting to reduce to possession and from in anywise interfering with or claiming any of the revenue or income of the complainant derived from any of the dues, assessments, mortuary calls or premiums which have accrued or which may accrue or be made upon any of the certificates of membership or policies of life insurance issued by complainant to any person or persons whatsoever, but the defendant, James S. Phelps, is left at full liberty to proceed otherwise to enforce against any other property or assets of the complainant any judgment he may have against the complainant by all lawful writs or processes as he may be advised.

The clerk will issue writs of injunction commanding the defendants accordingly upon the complainant executing a bond in the penalty of $2500.00, conditioned according to law.

12 STATE OF KENTUCKY, }
County of Jefferson. }

Pleas before the Honorable Sterling B. Toney, judge of the Jefferson circuit court, law and equity division, at the court-house in the city of Louisville, county and State aforesaid, and on the dates hereinafter mentioned.

JAMES S. PHELPS, Plaintiff, }
vs.
MUTUAL RESERVE FUND LIFE ASSOCIATION, Defendant. }

Transcript of Record.

Be it remembered, that heretofore, to wit, on the 28th day of February, 1900, came plaintiff, by counsel, and filed his petition and

two exhibits herein. Said petition is in words and figures as follows, to wit:

Jefferson Circuit Court Division.

JAMES S. PHELPS, Plaintiff,
vs.
MUTUAL RESERVE FUND LIFE ASSOCIATION, Defendant.

Petition Ordinary and Exhibits.

The plaintiff, James S. Phelps, states that the defendant, The Mutual Reserve Fund Life Association, is a corporation organized and existing under a charter, constitution and by-laws granted it by the laws of the State of New York, and as such corporation is vested with power to sue and be sued, contract and be contracted with, and to carry on the business of a mutual assessment life insurance company. The plaintiff states that the defendant is now and for many years past has been doing business and exercising corporate functions and powers in this State, and has now in Kentucky both an agent to superintend its affairs and an agent upon whom service of process may be had.

The plaintiff states that heretofore, to wit, on the 8th day of July, 1885, he made application for membership in the defendant association, by which he sought a policy or certificate of insur-
13 ance from the said association, the same to be an indemnity upon his life in the sum of five thousand dollars. The plaintiff states that said application for membership and insurance was by the defendant association approved and accepted, and thereafter, to wit, on July 16th, 1885, in consideration of said application and the further consideration hereinafter stated, the defendant association issued and delivered to the plaintiff a certificate of policy or written contract of insurance, duly signed by the officers of said association, bearing the seal of the corporation and numbered 34999 on the books of said company.

The plaintiff states that the consideration and mutual promises of parties to the said written contract of insurance are set forth in the said contract of insurance and were and are in part as follows:

"In consideration of the application for this certificate of membership, which is hereby referred to and made a part of this contract, and of each of the statements made therein, which, whether written by his own hand or not, every person accepting or acquiring any interest in this contract hereby adopts as his own, admits to be material and warrants to be full and true, and to be the only statements upon which this contract is made; and in further consideration of the admission fee paid, and of the dues for expenses to be paid on or before the sixteenth day of July in every year, during the continuance of this certificate, and of the further payment of all mortuary assessments, payable at the home office of the association in the city of New York, within thirty days from the first week day of the months of February, April, June, August, October and December of each and every year during the continuance of this certificate

for from such other periods as the board of directors may from time to time determine) and within thirty days from the day of the date that each assessment is ordered, the Mutual Reserve Fund Life Association, from and after the delivery thereof, with a receipt for the payment of the first annual dues signed by the president, secretary or treasurer of the association, does hereby receive James S. Phelps, of Louisville, county of Jefferson, State of Kentucky, as a member of said association.

Within ninety days after receipt of satisfactory evidence to the association of the death of the above-named member during the continuance of this certificate of membership upon the following conditions, there shall be paid to Lucy C. Phelps (sister), of Louisville, county of Jefferson, State of Kentucky, if living at the
14 time of said death, otherwise to the legal representatives of said member, the sum of five thousand dollars, from the death fund of the association, at the time of said death, or from any moneys that shall be realized to the said fund from the next assessment to be made as hereinafter set forth, and no claim shall be otherwise due or payable, except for the reserve fund as hereinafter provided.

I. If at such date, as the board of directors of the association may from time to time fix or determine for making an assessment, the death fund is insufficient to meet existing claims by death, an assessment shall then be made upon every member whose certificate is in force at the date of the last death assessed for, and said assessment shall be made at such rates, according to the age of each member, as may be established by said board of directors, and the net amount received from such assessment (less twenty-five per cent. to be set apart for the reserve fund), as provided in the constitution and by-laws of said association, shall go into the death fund.

Said policy or written contract of insurance is filed herewith, marked "Exhibit Policy," and made a part hereof.

The plaintiff states that the policy and contract aforesaid was issued and delivered by the defendant association under and by virtue of the powers vested in it by the constitution and by-laws of the Mutual Reserve Fund Life Association, a copy of which is filed herewith and made a part hereof, marked "Exhibit Constitution and By-Laws." Section 4 of article 2 of the said constitution and by-laws reads as follows:

"The corporate powers of the association shall be vested in the board of directors, who shall have power to adopt such rules and regulations as they deem necessary, not inconsistent with this constitution and by-laws, and to amend the same; and to fix the amount and rate of assessments, fees and dues; and to enact rules and regulations for the government of officers and employés, and for the management of the affairs of the association."

Section 5, article II, of said constitution and by-laws is in the following terms:

"On the first week day of the months of February, April, June, August, October and December of each year (or at such other dates as the board of directors may, from time to time, determine) an as-

sessment shall be made upon the entire membership in force, at the date of the last death of the audited death claims prior thereto for such a sum as the executive committee may deem sufficient
15 to meet the existing claims by death, the same to be apportioned among the members, according to the age of each member."

Plaintiff states that under the policy contract which he held with the defendant association, and under the constitution and by-laws of the said association, both hereinabove referred to, the defendant has now and at all times hereinafter mentioned had the power and authority to fix the amount and rate of assessments, fees and dues of the members, and to make an assessment upon every member whose certificate is in force at the date of the maturity of a demand against the association, such assessments to be made at such rates, according to the age of each member, as may be established by the board of directors of said association. Plaintiff states that the power and authority of the defendant association in the matters of assessments was and is limited and restricted to an assessment or assessments made upon the entire membership of the association, apportioned according to the age of each member, and that the defendant association does not now and has never possessed any power, right or authority to make any classification of its entire membership or part of said membership, save and except such as is based upon the age of its members, and such classification must be uniform and each and every member of the association of the same age must be, under plaintiff's policy contract and the association's constitution and by-laws, assessed and charged the same amount for equal amounts of insurance in force.

Plaintiff states that he continued a member of the defendant association, under and by virtue of his contract of membership and insurance as above mentioned, from July 16th, 1885, until the time of the defendant's acts as hereinafter complained of; during the continuance and existence of the plaintiff's contract with the defendant he promptly paid every assessment made and all dues and fees charged against him, and that in the discharge of his liabilities to the defendant association, and in the liquidation of its fees and assessments, he has paid to the defendant the sum of $1,994.20, the dates and amounts of such payments being shown specifically by a statement filed herewith as part hereof, marked "Exhibit Account." Plaintiff states that the payments made by him to the defendant association, as shown by the account above referred to, were made upon mortuary calls or bi-monthly assessments, and the amounts thereof were demanded of this plaintiff by the defendant to be paid within thirty days from the date of said call. Plaintiff states that said mortuary calls or bi-monthly assessments, as shown by
16 the amounts of the exhibit aforesaid, were not made upon every member of the defendant association of the same age as this plaintiff, but that the same *was* made upon an alleged classification of members of the defendant association based upon the length of time the policy of such member had been upon the books of the association.

Plaintiff states that the classification made by the defendant aforesaid, and upon which was based the mortuary calls or bi-monthly assessments made by the defendant and paid by this plaintiff during the years 1898, 1899 and in January, 1900, was in furtherance and in execution of a fraudulent plan and wrongful conspiracy of the defendant association to defraud the plaintiff of his rights under the contract of insurance which he then held with said association. Plaintiff states that at the time of such calls or bi-monthly assessments he was beyond the limit where he could secure other insurance or indemnity upon his life; that he had been a member of the association for many years, and had paid into the association large amounts of money; that his expectancy of life was small and the claim arising out of his policy with the defendant was nearing maturity.

Plaintiff states that acting upon the fraudulent plan above mentioned, the defendant association assigned this plaintiff to a class, the members of which were similarly situated as the plaintiff, and that the object and purpose of the defendant in making such classification was to force out of the association this plaintiff and other members of the class aforesaid, or require of such members the payment of exorbitant and excessive sums largely in excess of the amount which, under the plaintiff's contract of insurance and the association's constitution and by-laws, could be charged or assessed against this plaintiff and other members of said class. Plaintiff states that the classification aforesaid and the mortuary calls and assessments made thereunder were but an attempt upon the part of the defendant to defraud this plaintiff of his rights and the confiscation of his property; that such classification and assessment were not authorized by the plaintiff's contract of membership and insurance in the defendant association, or by the constitution and by-laws of the defendant association; but, on the other hand, said classification and assessments were directly contrary to the terms and agreements of the plaintiff's contract with the defendant and in conflict with the constitution and by-laws of the association. The plaintiff states that the defendant was organized as a mutual life insurance company, and was empowered by its charter to do only a
17 mutual life-insurance business; but plaintiff states that notwithstanding such provision of its charter and such limited powers, and notwithstanding the agreements contained in the contract of insurance existing between this plaintiff and defendant, the defendant association has repeatedly discriminated among its members of the same age, and has repeatedly charged different premiums and assessments against members of the same age and properly belonging to the same class; and that the defendant has charged and assessed against this plaintiff a larger sum than it charged and assessed against other members of the same age as this plaintiff, and properly belonging to the same class as this plaintiff. The plaintiff states that such classification and such assessment and such absence of mutuality were illegal and unjust; that the same were made and the acts complained of done without his knowledge or consent, and were and are in violation of his contract and in fraud of his rights.

Plaintiff states that the defendant in violation of its contract with this plaintiff has recently transferred many of its members to a plan of insurance radically different from the one in force at the time his contract of insurance was taken out with the defendant, and under which he continued a member of said association. Plaintiff states that the defendant without the knowledge or consent of this plaintiff has abandoned insurance on the assessment plan and is now writing policies on a legal reserve basis and upon the plan of the old-line life insurance companies with stipulated premiums. Plaintiff states that the defendant has no right or authority under its charter, constitution or by-laws to write insurance on any other plan than the assessment plan, and that the proceedings in soliciting and issuing policies on the legal reserve or straight life-insurance basis is in violation of its charter, constitution and by-laws and in violation and fraud of the rights which this plaintiff has under and by virtue of the same. Plaintiff states that the defendant has already induced many of its members to abandon their certificates of membership on the mutual or assessment plan and to accept certificates or policies of insurance on the straight insurance plan, and on a plan other than that of a mutual or assessment plan, and that the said association is now using every effort to transfer its members from the assessment to other and different plans of insurance. Plaintiff states that the direct result of the classification above complained of and the change of methods and plans for the conduct of defendant's business was and is to lessen the number of mem-
18 bers liable to assessment and call to meet the mortuary demands upon and the expenses of the association and to charge upon this plaintiff and other members continuing policies on the assessment plan more than his or their just proportion of the losses paid by the association and expenses incurred by it and further to diminish the prospects of this plaintiff and other persisting members of securing a settlement of his or their claims against the defendant arising out of the maturity of their policy contract.

Plaintiff further states that it was stipulated and agreed in his said policy of insurance that:

"The net earnings of the association, together with 25 per cent. of the receipts from each assessment shall constitute a reserve fund which shall be deposited with the trust company and be securely invested in United States bond mortgages or other interest-bearing securities by said trust company, as trustee, for the exclusive benefit of the members of the association and the interest on the same as it accrues shall be placed by said trustee to the credit of the death fund. The reserve fund above one hundred thousand dollars and in excess of sums represented by outstanding bonds may be applied to the payment of claims in excess of the American experience tables of mortality, and when any claim by death is due to making up any deficiency that may exist in the death fund."

The charter and by-laws of the defendant association also provide that at no time should any portion of said reserve fund be used for any purpose other than the purpose named; that the policy-holders of said association should receive the benefits from said reserve fund

and that the same should be used as stated in said policy so as to reduce the assessment of the policy-holders of said association. Plaintiff states that the defendant has willfully and fraudulently violated this provision of its contract in that it has failed to maintain said reserve fund as provided in said contract and has fraudulently used money belonging to said fund for purposes other than those provided in said contract, thereby increasing the assessments of this plaintiff.

Plaintiff states that it was further agreed and stipulated in his contract and policy of insurance that:

After the expiration of each period of five years during the continuance of this certificate of membership a bond will be issued bearing interest at the rate of four per cent. per annum payable annually to the death fund for an equitable portion of the reserve fund and the principal of the said bond shall be available ten years
19 from its date towards paying future dues and assessments under this certificate, and should membership hereunder cease by death or otherwise any portion of said principal thus used shall be applied to increase the bonds of the next quinquennial apportionment to other members of the association holding certificates issued during the same years as this certificate and at which apportionment the rate of assessment may be changed to correspond with the actual mortality expense of the association."

Plaintiff states that the defendant has wilfully and fraudulently violated its contract with this plaintiff in that it has not complied with its agreement to issue said bonds at the expiration of each period of five years, and that no bond has been issued by the defendant, to this plaintiff. Plaintiff states that instead of issuing to him bonds as agreed and required by his said contract, the defendant has issued to him "a bond statement," purporting to be the amount of the reserve fund to which this plaintiff was entitled; that the issuance of said bond statement in lieu of the bond was in violation of the contract between plaintiff and defendant and in fraud of plaintiff's rights. Plaintiff states that the defendant has not honestly or fairly represented or stated the correct amount of the reserve fund to which this plaintiff was and is entitled. Plaintiff states that a large number of policies were forfeited to the defendant or allowed to lapse by members of the defendant, but that the defendant has failed to apply the proportion of the said fund to which the holders of said forfeited or lapsed policies were entitled, to increasing the fund proportioned to this plaintiff as indicated in the bond statement above referred to, and has failed to account to this plaintiff in any way for his proportion of such fund. Plaintiff states that the defendant has wrongfully and fraudulently used and applied said fund to other purposes and uses, and that such action on the part of the defendant was and is in violation and in fraud of the right of this plaintiff.

Plaintiff states that the defendant has used a large proportion, to wit, the sum of two million dollars of the mortuary fund of the association in expenses and in other ways foreign to the uses and purposes for which said fund was created.

Plaintiff states that said mortuary fund was under his contract with defendant and the charter, constitution and by-laws of the association a trust fund for the payment of death losses and that the misappropriation and misapplication of such fund by the defendant was in violation and in fraud of the plaintiff's contract with defendant and his right under the same.

20 Plaintiff states that in his said contract or policy of insurance the following stipulation was contained:

"Within thirty days from the first week day of the months of February, April, June, August, October and December, of each and every year during the continuance of this policy there shall be payable to the association a mortuary premium for such an amount as the executive committee may deem requisite, which amount shall not exceed the maximum rates endorsed thereon according to the age of each member and the net amount received to be dealt with as provided in the constitution or by-laws of the association or provided under the terms of this contract."

Plaintiff states that notwithstanding said agreement the defendant has repeatedly exceeded the amount of the mortuary premium at its maximum rate as endorsed upon the back of his contract in its demands upon this plaintiff. He states that such mortuary premiums demanded and collected as aforesaid were in violation and fraud of his contract, with defendant, and his rights under the same.

Plaintiff states that by reason of the repeated violations by the defendant of the terms and conditions of his policy contract with it, and the repeated breaches which the defendant has been guilty of with respect to said contract, that said contract has been canceled, annulled and renounced by the defendant and this plaintiff is entitled to and should receive a return of the money which he has paid defendant as hereinbefore set forth.

Wherefore plaintiff prays judgment against the defendant in the sum of $1994.20, with interest on the various amounts going to make up said sum from the dates of the payment of such various amounts to the defendant association. Plaintiff prays for his costs herein expended, and for all other and further relief, general, equitable and special.

ZACK PHELPS,
BENJ. F. WASHER,
Att'ys for Plaintiff.

STATE OF KENTUCKY, }
County of Jefferson, } *ss:*

James S. Phelps states that he is the plaintiff in the foregoing petition and that the allegations and statements contained therein are true, as he believes.

JAMES S. PHELPS.

Subscribed and sworn to before me by James S. Phelps, this 23rd day of Feb., 1900. My commission expires Jan. 8, 1902.

M. E. McLOUGHLIN,
Notary Public, Jefferson County, Kentucky.

My commission expires January 8th, 1902.

21 Thereupon the clerk issued summons and copy to Franklin county, which said summons is as follows:

Jefferson Circuit Court.

The Commonwealth of Kentucky to the sheriff of Jefferson county, Kentucky:

We command you to summon Mutual Reserve Fund Life Association to answer a petition filed against it in our Jefferson circuit court by James S. Phelps, No. 24371, and warn it that upon failure so to do for twenty days after service hereof, if in Jefferson county, or for thirty days if elsewhere in the State, judgment may be rendered by default, or answer compelled, or proof taken at petitioner's option; and make due return hereof within sixty days from date hereof.

Witness John H. Page, clerk of said court, this 28th day of February, 1900.

JOHN H. PAGE, *Clerk*,
By FRANK DACHER, *D. C.*

Sheriff's return on foregoing summons is as follows:

Executed on the Mutual Reserve Fund Association by delivering to W. H. Stone, insurance commissioner of the State of Kentucky, at Frankfort, a true copy of the within summons this March 1st 1900.

D. F. SUTER, *S. F. C.*,
By J. W. SUTER, *D. C.*

And thereupon the clerk issued alias summons and copy, which said summons is as follows:

Jefferson Circuit Court.

The Commonwealth of Kentucky to the sheriff of Jefferson county, Greeting:

We command you to summons Mutual Reserve Fund Life Association to answer a petition filed against it in our Jefferson circuit court by Jas. S. Phelps, No. 24371, and warn it that upon failure so to do, for 20 days after service hereof, if in Jefferson county, or for thirty days if elsewhere in the State, judgment may be rendered by default or answer compelled, or proof taken at petitioner's option; and make due return hereof, within sixty days from date hereof.

Witness John H. Page, clerk of said court, this 1st day of March, 1900.

JNO. H. PAGE, *Clerk*,
By M. RYAN, *D. C.*

22 Sheriff's return on foregoing summons is as follows:

Executed the within process by delivering a copy thereof to Ben Frese, he being the managing agent and chief officer and agent of the Mutual Reserve Fund Life Association found in this county.

This March 1, 1900.

W. L. DOOLAN, *Special Bailiff.*

I hereby appoint W. L. Doolan a special bailiff to execute the within writ.

H. A. BELL,
Sheriff J. C.,
By J. A. LUDWIG, *D. S.*

Affiant W. L. Doolan states that he is a white male person over 16 years of age, not interested in this action nor related to any of the parties thereto, and that the return hereon is true.

W. L. DOOLAN.

Subscribed and sworn to before me by W. L. Doolan, this 29th day of March, 1900.

JOHN H. PAGE, *Clerk.*

At a court held on the 14th day of April, 1900.

This action having been set at rules on the 9th day of April, 1900. Came the defendant by counsel and filed the affidavit of J. S. Pirtle herein. The defendant enters its appearance especially for the sole purpose of moving, and it does move, the court to quash. 1. The return of W. B. Doolan, special bailiff, on the summons herein served on B. Frese. 2. The return of the sheriff of Franklin county on the summons herein served on W. H. Stone, insurance commissioner. And on further motion of defendant by counsel, said motions be and are assigned to April 23rd, 1900, for hearing.

Said affidavit of James S. Pirtle filed on the 14th day of April, 1900, is as follows:

Jefferson Circuit Court, Law and Equity Division.

JAMES S. PHELPS, Plaintiff,
vs.
MUTUAL RESERVE FUND LIFE ASSOCIATION, Defendant. } Affidavit.

James S. Pirtle, states that he is one of the attorneys of the defendant to this action. That the defendant has no agent in
23 Jefferson county, Kentucky, known to the affiant. That the license of the defendant to do business in the State of Kentucky expired prior to the time of the bringing of this action, and the service of the summons on the insurance commissioner in the State of Kentucky, and said association had been and was prior to said time excluded by the said insurance commissioner from doing business in Kentucky, and said defendant was not at the time of the service of the summons herein upon the said insurance commissioner doing business in the State of Kentucky, and had no licensed agent in the State of Kentucky at said time.

That C. K. Lehrberg was the last agent of the said defendant designated by it as the person upon whom process should be served, and that on or about the 1st of October, 1899, the license of said C. K. Lehrberg to act as agent for the defendant was revoked by the insurance commissioner of the State of Kentucky.

And affiant further states that B. Frese upon whom summons was

served was not at the time said summons was served upon him an agent or officer of the defendant and never has been such agent or officer.

JAMES S. PIRTLE.

Subscribed and sworn to before me by James S. Pirtle this 14th day of April, 1900. My commission expires on the 6th day of January, 1904.

ATTILLA COX, JR.,
N. P., J. C., Ky.

At a court held on the 23rd day of April, 1900.

On motion of defendant and by consent of parties by counsel, it is ordered by the court that this action be and is reassigned to April 26, 1900, for hearing of pending motions herein.

At a court held on the 26th day of April, 1900, came defendant by counsel and filed the affidavit of Chas. W. Camp and certain exhibits, to be read on the motion to quash the return on the summons.

And said motions having been heard it is considered and adjudged by the court that said motions to quash the return on the summons be and they are hereby overruled, to which the defendant excepts.

Said affidavit of Chas. W. Camp and exhibits are missing from the papers and cannot be copied herein.

24 At a court held on the 5th day of May, 1900, came plaintiff by counsel and filed his affidavit herein, and it is ordered that said affidavit is filed *nunc pro tunc* as of April 26, 1900.

Said affidavit of plaintiff filed on the 5th day of May, 1900, is as follows:

Jefferson Circuit Court, Law and Equity Division.

J. S. PHELPS, Plaintiff,
vs.
MUTUAL RESERVE FUND LIFE ASSOCIATION, Defendant. } Affidavit.

The affiant, J. S. Phelps, states that he is the plaintiff in this action, and that his relations with the defendant association are and have been as set forth in this petition herein filed.

Affiant states that on November 1st, 1899, August 30th, 1899, and January 2nd, 1900, he paid to the defendant mortuary calls Nos. 105, 106, 107; that said payments were made to B. Frese, who represented himself as the local treasurer of the Mutual Reserve Fund Life Association, said money being paid to him and received by him in such official capacity. Affiant states that said Frese on the occasions mentioned and on a great many occasions prior thereto accepted the payment of money owing to the Mutual Reserve Fund Life Association, and executed and delivered to this plaintiff a receipt signed by George W. Harper, treasurer, and countersigned by B. Frese, local treasurer. Such receipts for the dates mentioned are filed herewith as a part of this affidavit.

Affiant states that the B. Frese mentioned above is the same person upon whom service of process was had in this action as Ben Frese, chief officer and managing agent in this county of the defendant association.

J. S. PHELPS.

Subscribed and sworn to before me by J. S. Phelps, this April 28th, 1900. My commission expires Jan'y 8th, 1902.

M. E. McLAUGHLIN,
N. P., J. C., Ky.

Said exhibits filed with the foregoing affidavit are as follows, to wit:

Mutual Reserve Fund Life Association (incorporated).

Frederick A. Burnham, president.

Mutual Reserve building, 305, 307, 309 Broadway, New York.

Received of James S. Phelps this — day of ——, 1899, eighty-four $\frac{66}{100}$ ($84.66) in payment of mortuary call No. 107 on policy No. 34999, subject to the terms and conditions endorsed hereon and of said policy contract, and to all agreements and conditions relating thereto.

GEORGE W. HARPER, *Treasurer.*

Above payment made within time.
This receipt countersigned on this 2 day of January, 1900, by B. Frese, local treasurer.

NOTICE.—This receipt shall not be valid and local treasurers are not authorized to issue same unless payment of the mortuary call for which it is given is actually made in cash within the time stated in the notice for such mortuary call.

Foregoing exhibit endorsed as follows:
Terms and conditions.—Members may remit, annually or semi-annually in advance, and avoid lapsing their policies, special deposit receipts will be sent for such payments. In the event of the death of the member, any excess of the sum paid in advance after deducting all indebtedness is returnable to the beneficiary.

Mortuary calls are made upon the members of the association on the first week day of the months of February, April, June, August, October and December of each year. All mortuary calls are due and payable at above dates respectively, and must be paid within thirty days of such dates or the policy will expire. Annual dues are due and payable on the dates stated in the policy (without grace). Mortuary calls and annual dues are payable only at the home office of the association in the city of New York or to an authorized local treasurer, whose name is stamped on the notice, who is furnished with a receipt signed by the treasurer of the association which must be duly countersigned.

The acceptance of the foregoing mortuary call shall not be
26 held to waive any forfeiture caused by non-payment of any previous sum when due or otherwise. Remittances must be paid by valid draft, check, post-office or express money order, and any credit made or receipt given is conditioned on payment of such draft, check, post-office or express money order on presentation; and if not so paid any credit made or receipt given shall be null and void; cash sent by mail or payments made to agents or other persons whose names are not stamped on the notice, are unauthorized, and at the members' own risk.

Agents or local treasurers are not allowed to make, alter or discharge contracts, grant credits or waive forfeitures.

At a court held on the 19th day of May, 1900:

This action having heretofore been submitted upon a motion to quash the service of process. Upon which motion the court made the following findings of law and facts which are incorporated in and made a part of this judgment, to wit:

First. Upon proof induced by affidavits the court was and is of the opinion that Ben Frese at the time of service of summons upon him in this action was the local treasurer of the defendant association in Jefferson county, Kentucky, and as such was an agent of the company upon whom summons might be served, and the defendant association thereby brought before the court. By the summons herein upon the said Ben Frese, the defendant association was brought before this court in this action, and the jurisdiction of this court to grant the relief prayed for in the petition became vested.

Second. It appearing from proof induced by affidavits that the defendant association did by resolution of its board of directors adopted prior to the service of summons in this action, consent that service of process upon commissioner of insurance of this State in any action, brought or pending in this State, should and shall be a valid service upon said defendant association, and it further appearing to the court that the authority and power to receive service of process thus vested in the commissioner of insurance of Kentucky has never been revoked, cancelled or annulled, this court held and now holds that the summons served upon the commissioner of insurance of Kentucky, in this action was a valid and sufficient service, and operated to bring the defendant association before the court and subject said defendant association to the jurisdiction and decrees of this court in this action.

27 This action having now been regularly set at rules and called by the court and the necessary time for answer having elapsed without any action being taken by the defendant the cause was regularly submitted for judgment. The court being advised by the uncontroverted allegations of the petition that the prayer of said petition should be granted; it is, therefore, ordered and adjudged that the plaintiff recover of the defendant the sum of nineteen hundred and ninety-four ($1994) dollars, with interest on the various amounts going to make up said sum from the dates of the payments of such various amounts to the defendant association as

shown by the itemized statement and account filed with the petition; amounting in all to twenty-three hundred and sixty ($2360.00) dollars, with interest from this date, May 19th, 1900, and that plaintiff further recover of defendant his costs in this action expended, for all of which debt, interest and costs the plaintiff may have immediate execution.

At a court held on the 4th day of August, 1900:

Came the plaintiff, James S. Phelps, by Zack Phelps and B. F. Washer, his attorneys, and presented to the court his amended and supplemental petition, which is now ordered filed and this action transferred to the equity docket; and it appearing to the court that the process of attachment sought by the prayer of plaintiff's amended and supplemental petition involves a multiplicity of parties and a burdensome and expensive proceeding which, as appears to the court, can be avoided and the rights of all parties concerned better subserved by the appointment of a receiver in lieu and instead of the attachment as prayed.

It is now, therefore, ordered, decreed and adjudged that the Fidelity Trust and Safety Vault Company be and it is hereby appointed receiver of the Mutual Reserve Fund Life Association in Kentucky, and of all the assets and property of the Mutual Reserve Fund Life Association in Kentucky of whatever description and wherever located. The said The Fidelity Trust and Safety Vault Company as receiver is hereby authorized, empowered and instructed to take possession of all assets and estate of the Mutual Reserve Fund Life Association in Kentucky; collect and receive all moneys, debts, things in action and credits now owing to or hereafter to accrue to the said Mutual Reserve Fund Life Association in Kentucky, and to take and hold any and every interest, privilege and franchise, together with all other assets of every kind,
28 which the said association may now own, or may hereafter acquire in Kentucky. Said receiver shall take into possession all the revenue and income which has accrued or may hereafter accrue to the defendant from its business in this State and policy-holders; all persons insured in said Mutual Reserve Fund Life Association and all other debtors of said association in Kentucky are now specifically ordered and directed to pay to the receiver herein appointed all dues, premiums, assessments and whatever else of value may now be or hereafter become owing or due to the said defendant association. And all policy-holders, all persons insured and all other debtors as aforesaid are now warned that any disobedience on their part of this order, or failure by them to comply with the provisions of this decree, shall make them liable to summary proceedings and punishment for contempt. All property, moneys and assets coming into the hands of the receiver herein appointed shall be held by him to the further administration by the court of said property and funds for the following purposes:

First. To the satisfaction in full of the judgment held by plaintiff against defendant hereinbefore referred to, with interest. Second. To the costs and expenses of the receivership, including reasonable

compensation to the receiver and proper fees to his counsel. Third. To the costs of this action. When such judgment shall be paid, and such expenses and costs liquidated, the receivership provided for herein shall terminate. The receiver shall make reports to the court of all his acts and proceedings at such time or times as the court shall direct.

In carrying out this decree and order, the receiver is authorized and empowered to employ counsel, engage assistants, and incur such other expense as may be necessary to the proper and efficient execution of the trust herein imposed upon him. Said receiver may institute and prosecute all such suits at law and in equity as may be necessary, and to defend any action which may be instituted against him or affect property in which he as receiver has an interest.

All persons are hereby enjoined and restrained from interfering with the receiver herein appointed in the custody, management and control of the property, assets and rights hereby impounded and placed in the hands of said receiver for the purposes and objects hereinbefore stated. The receiver shall qualify by executing bond with its capital stock as surety in the sum of $3000.

STERLING B. TONEY, *Judge.*

29 Then came the Fidelity Trust and Safety Vault Company, appointed receiver of the Mutual Reserve Fund Life Association in Kentucky, by the foregoing order, and qualified by executing bond with its capital stock as surety, which bond is now approved by the court, and the said Fidelity Trust and Safety Vault Company is instructed to and does now enter into the active execution of the trust provided for in the foregoing order.

STERLING B. TONEY, *Judge.*

Jefferson Circuit Court, Law and Equity Division.

JAMES S. PHELPS, Plaintiff,
vs.
MUTUAL RESERVE FUND LIFE ASSOCIATION, Defendant.

Amended and Supplemental Petition.

The plaintiff, James S. Phelps, comes, and by leave of court, filed his amended and supplemental petition, and states that as appears from the record of this cause, — instituted this action in the Jefferson circuit court against the defendant, The Mutual Reserve Fund Life Association, which action has been duly docketed in this division of the court. Plaintiff states that in this said action proceedings had been had *to* the result that on May 19th, 1900, a judgment was duly rendered by this court adjudging a recovery in favor of this plaintiff against the defendant, The Mutual Reserve Fund Life Association, in the sum of two thousand three hundred and sixty dollars ($2360.00) with interest from May 19, 1900. Thereafter, to wit, on May 21st, 1900, the clerk of this court issued upon said judgment an execution of *fieri facias*, directed to the sheriff of Jefferson

county, Kentucky, commanding that officer to make out of the estate of the Mutual Reserve Fund Life Association the amount of the judgment which this plaintiff recovered against it. Said execution was as stated, directed to the sheriff of Jefferson county, Kentucky, which county was the one in which the action aforesaid was instituted and the judgment hereinbefore mentioned was rendered and said officer was the proper one to execute the process aforesaid. The plaintiff states that the above-mentioned execution of fi. fa.
30 was duly placed in the hands of the sheriff of Jefferson county to whom the same was directed, who at the time made the following endorsements thereon: Came to hand May 21st, 1900, at 2.45 p. m. Afterwards, to wit, on the 12th day of June, 1900, the following endorsement was placed upon said execution by plaintiff's attorneys: "The sheriff is directed to return this *fi. fa.* in accordance with the facts, June 12th, 1900."

Plaintiff states that thereafter, to wit, on June 12th, 1900, and before the return day thereof, the above-mentioned execution or fi. fa. was by the sheriff of Jefferson county, Kentucky, returned with the following endorsement on the back thereof: "No property found out of which to make this fi. fa. or any part thereof. H. A. Bell, S. J. C., by E. R. Bate, D. S.

Said execution is a part of the record in this action and is referred to and made a part of this petition for further particularity.

The plaintiff states that the judgment on which the execution hereinbefore referred to was issued has never been superseded, annulled or reversed, and the same is now in full force and effect; that no part, principal or interest has been paid, that the same is wholly due and payable.

Plaintiff states that the defendant, The Mutual Reserve Fund Life Association, is now, and for more than fifteen years past has been, an insurance company issuing policies of life insurance for which it receives dues, premiums and assessments from parties insured. Plaintiff states that for many years prior to December, 1899, the defendant was engaged in its business—life insurance—in the State of Kentucky; with agents conducting its affairs, canvassing for new business, receiving moneys due the company and otherwise attempting to promote its interest and protect its rights. Plaintiff states that in December, 1899, the insurance commissioners of the State of Kentucky cancelled and annulled the power, right and authority to longer canvass for new business or thereafter to issue new policies of insurance or make any new contracts or agreements in this State. After the annullment and cancellation of defendant's right and authority as aforesaid, the Mutual Reserve Fund Life Association withdrew from Kentucky all of its agents and employés who had previously been engaged by it in the transaction and conduct of its business. Plaintiff states that prior to December, 1899, policy-holders in Kentucky paid all moneys due defendants to local collectors and treasurers located in this State for the purpose of receiving funds due and accruing to the defendant associa-
31 tion. After December, 1899, the defendant revoked the authority of such collectors and treasurers to longer receive

anything of value belonging or coming to said association, and defendant instructed all the policy-holders and debtors in Kentucky to forward directly to the home office in New York whatever such policy-holders and debtors owed or might hereafter owe to the said association.

Plaintiff states that each and all of the acts and proceedings of the defendant, The Mutual Reserve Fund Life Association, in this State since December, 1899, have been in pursuance and prosecution of a plan and scheme prepared and pursued by the said defendant for the purpose of preventing suits being instituted and tried in this State by citizens thereof holding claim against it, and for the further purpose of cheating and defrauding Kentucky creditors of their rights, claims and demands against the association aforesaid.

Plaintiff states that since December, 1899, the defendant has continued to do business in this State and that it has continued in force policy contracts of insurance on which it has collected and does now collect large sums of money from citizens of Kentucky. That the defendant has now in this State a large number of policy-holders who at stipulated times and regular intervals became indebted to the defendant association in various sums, which are due and owing and became due and owing to the defendant as dues, premiums and assessments on policies of insurance. The parties thus indebted to the defendant, the amounts of such indebtedness are not known to this plaintiff, but in good conscience and equity all moneys owing and accruing to the defendant from residents of this State, or so much thereof as may be necessary to satisfy the judgment hereinbefore mentioned, should be employed to the satisfaction and settlement of the claim of this plaintiff against the defendants as set forth above.

Plaintiff states that it is a fraud upon his rights and an attempted evasion of the process of this court for the defendant association to annually receive large sums of money from the citizens of Kentucky, and at the same time contend and protest that it is not doing business in this State, and is not subject to any process of a court of Kentucky. Plaintiff states that for many months past the defendant has been taking and removing from this State and from the jurisdiction of this court its property and assets for the purpose and with the intent of fraudulently preventing this plaintiff from
32 recovering on a judgment rendered by this court in his favor as before herein stated, and of further cheating and defrauding this plaintiff of his claim against the defendant as vested in him by the judgment aforesaid.

Plaintiff states that the business of the defendant in this State together with all the assets it owns in Kentucky and its debts and demands which it may now or hereafter hold against the residents and citizens of this State shall be attached, impounded and sequestered by proper order of this court, and employed in the satisfaction and settlement of his claim against the defendant as particularly hereinbefore set forth.

Wherefore the plaintiff prays for a decree in aid of and in the en-

forcement of the judgment heretofore rendered in this court, and to this end plaintiff prays that a general attachment issue against the property of the defendant, The Mutual Reserve Fund Life Association; that the defendant and all persons now or heretofore connected with said defendant be required to appear before the commissioner of this court, and disclose any money, choses in action, equitable or legal interest, and all other property to which the defendant is entitled *to* or to which it has an interest; or if it seems best to the court, the plaintiff prays that a receiver be appointed to take charge of the business, assets and all other property of every kind and description which the defendant has in Kentucky, or may hereafter obtain in this State, that all revenues and incomes accruing to the defendant from policy-holders and other debtors be ordered paid to said receiver; and that so much as may be necessary of any money or property belonging to the defendant as may by an order or process come within the jurisdiction of this court be employed to the settlement and satisfaction of the judgment which the plaintiff holds against the defendant, as set forth and mentioned herein. Plaintiff prays for his costs in this action, and for all other relief, general, equitable and special.

ZACK PHELPS AND
B. F. WASHER,
Att'ys for Pl'ff.

B. F. Washer states that he is one of the attorneys for the plaintiff herein, that the plaintiff, James S. Phelps, is now absent from the State of Kentucky and county of Jefferson, and that the foregoing statements of this amended and supplemental petition are true as he verily believes.

B. F. WASHER.

33 Subscribed and sworn to before — this 4th day of August, 1900, by B. F. Washer. My commission expires on January 12, 1902.

FREDERICK FORCHT, JR., *N. P., J. C.*

And on the 4th day of August, 1900, the following bond was executed and filed in the clerk's office:

COMMONWEALTH OF KENTUCKY, }
Jefferson County. }

Jefferson Circuit Court, Law and Equity Division.

JAMES S. PHELPS, Plaintiff,
vs.
MUTUAL RESERVE FUND LIFE ASSOCIATION, Defendant. } No. 24371. Bond.

We, Fidelity Trust and Safety Vault Company, principal, and its capital stock as surety, bind ourselves to the Mutual Reserve Fund Life Association in the sum of three thousand ($3,000.00) dollars

that the said Fidelity Trust and Safety Vault Company, as receivers will faithfully discharge all of its duties as such, and will comply with the judgment and orders of the court in the action, and will account for, pay and deliver to the said Mutual Reserve Fund Life Association all moneys or property due or belonging to it when required.

Witness our hands this 4th day of August, 1900.

FIDELITY TRUST & SAFETY VAULT COMPANY,
By JOHN STITES, *President.*

At a court held on the 22nd day of August, 1900:

Came Attilla Cox, by counsel and tendered and moved the court to file his petition for advice herein, to which the plaintiff objects and the court being advised, overruled said motion, to which Attilla Cox excepts.

Came defendant, by counsel, and tendered and moved the court to file its petition and bond for removal of this case to the United States circuit court, to which the plaintiff objects.

Ordered by the court that said motion be, and is, submitted.

34 Said petition for removal tendered on the 22nd day of August, 1900, is as follows:

Jefferson Circuit Court, Law and Equity Division.

JAMES S. PHELPS, Plaintiff,
against
MUTUAL RESERVE FUND LIFE ASSOCIATION.

Petition to Remove this Case to the United States Circuit Court for the District of Kentucky.

To the honorable Jefferson circuit court, law and equity division:

Your petitioner, The Mutual Reserve Fund Life Association, appearing for the sole purpose of filing this petition and the accompanying bond, and not waiving the objection to the jurisdiction of this court over it, respectfully states that it is named as the defendant in the above-entitled action; that said action is of a civil nature, and that the amount in dispute therein, exclusive of interest and costs, exceeds the sum or value of $2,000, and is the amount plaintiff claims therein, viz: $2,360, with interest from May 18th, 1900.

That it is an equitable action apparently based, or sought to be maintained, upon the statutory authority of section 439 of the Code of Practice in Civil Cases, based upon a return made by H. A. Bell, sheriff of Jefferson *circuit* county, upon a certain execution of *fieri facias*, which plaintiff claims issued from the office of the clerk of this court on or about the 21st day of May, 1900, directed to the said sheriff commanding the said sheriff to take the goods and chattels of your petitioner to the said sum of $2360, with interest from May 19th, 1900, which the said plaintiff assumed to have recovered of your petitioner under a certain judgment of this court, dated May

19th, 1900, which your petitioner is advised was without process, and utterly null and void, the said return of the said sheriff being "No property found out of which to make this *fi. fa.* or any part thereof;" and in said action or suit, said plaintiff, as a basis for attachment, or receiver, asserts that petitioner has been guilty of certain acts, which he denominates as done for the purpose of cheating
35 and defrauding the plaintiff, all of which claims of the plaintiff your petitioner will controvert in said United States circuit court, if said court shall retain jurisdiction of your petitioner.

Your petitioner further states that it is, and at the time of commencement of this action was, a corporation duly created and organized under and pursuant to the laws of the State of New York, with its principal office and place of business *is* in the city of New York, in said State of New York, and a citizen of said State of New York, and that the plaintiff, James S. Phelps, is, and at the time of the commencement of this action was, a citizen of the State of Kentucky, and an inhabitant of the district of Kentucky.

And your petitioner offers herewith a bond, with good surety, conditioned according to law, for your petitioner entering in said United States circuit court, on or before the first day of its next regular session, a copy of the record in this suit, and for paying or causing to be paid all costs that may be awarded therein by said United States circuit court, if said court shall hold that said suit was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays that this court proceed no further herein, except to accept the said petition and bond, and approve the said bond; and your petitioner will ever pray, &c.

MUTUAL RESERVE FUND LIFE ASSOCIATION,
By PIRTLE & TRABUE, *Attorneys.*

Edmund F. Trabue states that he is one of the attorneys of the petitioner, and that all of its officers and agents are absent from Jefferson county, Kentucky, and that the statements contained in the foregoing are true as he verily believes.

EDMUND F. TRABUE.

Subscribed and sworn to before me by Edmund F. Trabue, this 22nd day of August, 1900.

JNO. H. PAGE,
Clerk, Jefferson Circuit Court.

36 Said bond for removal, tendered on the 22nd day of August, 1900, is as follows:

Jefferson Circuit Court, Law & Equity Division.

JAMES S. PHELPS, Plaintiff,
against
MUTUAL RESERVE FUND LIFE ASSOCIATION.

Know all men by these presents that we, Mutual Reserve Fund Life Association, principal, and Edmund F. Trabue, surety, are held

and firmly bound unto James S. Phelps, plaintiff in the above-entitled cause, his executors, administrators and assigns, in the sum of two hundred and fifty dollars ($250.00), lawful money of the United States of America, for the payment of which, well and truly to be made, we and each of us bind ourselves and each of us, our heirs, executors and administrators, jointly and severally by these presents.

The condition of this obligation are such that whereas, the said Mutual Reserve Fund Life Association has petitioned the said Jefferson circuit court, law and equity division, in and for Jefferson county, State of Kentucky, for the removal of a certain cause therein pending, wherein James S. Phelps is plaintiff and said Mutual Reserve Fund Life Association is denominated defendant, to the United States circuit court for the district of Kentucky, for further proceedings on grounds in said petition set forth.

Now, therefore, if your petitioner aforesaid shall enter in the said United States circuit court for the district of Kentucky, on or before the first day of its next regular session, a copy of the records in said suit, and shall pay or cause to be paid the costs that may be awarded herein by said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise shall remain in full force and effect.

Witness our signatures this 22nd day of August, 1900.

MUTUAL RESERVE FUND LIFE ASSOCIATION,
By EDMUND F. TRABUE, *Attorney.*
EDMUND F. TRABUE.

37 At a court held on the 23rd day of August, 1900:

The court being advised, it is considered and adjudged that defendant's motion to file its petition and bond for removal of this case to the United States circuit court, be and the same is hereby overruled, to which the defendant excepts.

The affidavit of Charles K. Lehrberg, above referred to, is as follows:

United States Circuit Court, District of Kentucky.

MUTUAL RESERVE FUND LIFE ASSOCIATION, Plaintiff,
against
FIDELITY TRUST & SAFETY VAULT CO., &c., Defendants. } 6821.

Affidavit of Charles K. Lehrberg.

Charles K. Lehrberg states that for eleven years prior to October, 1899, when the insurance commissioner of Kentucky canceled the license of the complainant, The Mutual Reserve Fund Life Association, he had been general agent and representative of that association in Kentucky. That the association was then doing a flourishing business in Kentucky; that its insurance in force in that State approximating three and one-half millions of dollars; that it was held by over one thousand members, and that the annual income

from said members in annuel dues and assessments equaled or exceeded $75,000; that affiant has not accurate information as to the amount of policies lapsed since or of the cancellation of such insurance, but is satisfied that he would be safe in saying that at least two-thirds of such insurance then existing in Kentucky is in force, and that the annual income of the said association from such members is at least fifty thousand dollars, and affiant believes that it is much greater than that amount. Affiant further states that the mortuary call made by said association on its members, which is call No. 111, was payable August 1, 1900, with the option to the member- to pay it any time on before August 31, 1900; that upon failure of the members to pay the said call on said August 31, 1900, the policy upon which the call is made will lapse, so that the said August 31, 1900 is the last day of grace for payment of said
38 call to entitle said policy-holders to keep alive the said policies and preserve their rights thereunder. Affiant attaches hereto, as a part of this affidavit, the notice received by him as a holder of a certificate of membership No. 32090.

Affiant further states that all the certificates of membership issued by the said association are not on the same plan, but that under all of them the insurance is renewable, at the option of the member, and that no personal liability attaches to any member to any of the dues or assessments, and that the payment of the dues and assessments are not coercible by the association. That said nature of such insurance is made known by the agents of the association, and has ever since he has had knowledge of its methods been made known to persons becoming members of such association, whenever the question has arisen, and that in the more recent certificates of membership, which are those more largely in force than any others in the State of Kentucky, and which have been in use as long as eight or ten years to the knowledge of affiant, it is provided expressly as follows: "No personal liability is incurred by becoming a member of this association. This contract is a bi-monthly term insurance renewable at the option of the member upon payment of premiums at the times and in the manner herein provided, and all premiums received, however payable, are applicable *pro tanto* to the bi-monthly renewal of this contract."

Affiant states that immediately upon the cancellation of complainant's license by the insurance commissioner of Kentucky, the power of attorney of affiant and all other agents of the association known to affiant was revoked, but that since August 4, 1900, a great many of the holders of certificates of membership in said association, knowing that affiant had been its agent, have called upon affiant to ascertain what should be done by them in view of the notice received by them from the Fidelity Trust and Safety Vault Company, being a notice like that filed with the bill of complaint in this case, and expressing great perplexity as to what course to pursue. That some of such persons have expressed to affiant the fear that they might make a mistake and thereby forfeit their policies if they failed to pay to the association calls made upon them by it, but also expressing the fear that if they failed to pay to the receiver they should

thereby incur liability to punishment for contempt of the orders of the Jefferson circuit court. That some of such policy-holders have expressed to affiant their inclination to drop their policies and permit them to lapse as the only way
39 out of the dilem-a presented by the notice received from the Fidelity Trust and Safety Vault Company. That the demoralization and feeling of uncertainty aroused by the said company's communication has been very great and widespread among the members of the association, and that affiant is convinced that unless the question to whom such payments should be settled a sufficient length of time before August 31, 1900, to enable the dues and assessments payable on or before that date to be made by that date, a great many members will be so demoralized that they will permit their policies to lapse, and that the association will thereby lose a large amount of business and money which they would otherwise receive as dues and assessments aggregating many thousands of dollars, and largely exceeding two thousand dollars, exclusive of interest, and that thereby such members will lose insurance which they have been carrying for years, and which has been growing more valuable to them as they have grown older.

That the amount of dues and assessments upon such policies as would lapse, and which would be lost to the association, would not be susceptible of exact computation, but would aggregate many thousands of dollars as aforesaid in the State of Kentucky, and that the injury which would result to the association if an injunction were not granted to prevent the acts threatened by the said trust company would exceed many times the said sum of two thousand dollars, exclusive of interest. That the said association transacts a life-insurance business on the co-operative or assessment plan; that it operates in many States of the United States, and derives its revenues solely from voluntary contributions of its members, and from its investments, and that its success is dependent entirely upon the confidence of the public, and that the action of the Jefferson circuit court in appointing a receiver and of the receiver in sending the notices hereinbefore mentioned, a specimen copy of which is filed as an exhibit with the bill of complaint, to the holders of certificates of membership in Kentucky, and the threats of the receiver to proceed against the members of the association in Kentucky to collect dues and assessments, and to cause them to be punished for contempt of the State court in event of the contingencies expressed in the notice, have caused and are causing the association great and irreparable injury, and will continue so to do as long as it shall last. That the said association is amply solvent and absolutely able to pay
40 all its liabilities in full, and that the fear that instability in its financial condition inspired in its members by the acts of the said trust company is an injustice to the association and its members with the natural result of the actions of the said court, and the said trust company.

Affiant attaches hereto, as part of this affidavit, four specimen copies of policies in general use by the association, one called "twenty-payment option policy," a second called "twenty-five-year term ex-

tendible," and a third called "whole life," and so marked, respectively, and a fourth number "128937."

The last has been in use about ten years, the other three for a lesser time.

Charles K. Lehrberg says that the statements contained in the foregoing affidavit are true to the best of his knowledge and belief.

C. K. LEHRBERG.

Subscribed and sworn to before me this 25th day of August, 1900. My commission expires January 6, 1904.

ATTILLA COX, JR.,
Notary Public, Jefferson Co., Ky.

The affidavit of Ely D. Graff, above referred to, is as follows:

United States Circuit Court, District of Kentucky.

MUTUAL RESERVE FUND LIFE ASSOCIATION, Plaintiff,
vs.
FIDELITY TRUST AND SAFETY VAULT CO., &c., Defendants. } 6321.

Affidavit of Ely D. Graff.

Ely D. Graff says that he is and for many years has been the general agent and principal representative of the American Express Company in Louisville, Kentucky; that he is the holder of two certificates of membership of the complainant association. That the first certificate was issued about fifteen years ago for three thousand dollars, and the other seven or eight years ago for one thousand dollars. That he has received from the Fidelity Trust and
41 Safety Vault Company two circular papers, one a typewritten letter and the other what purports to be a printed copy of an order of the Jefferson circuit court. That the receipt of those papers has very much perplexed him and caused him to doubt what course to pursue with regard to the payment of dues and assessments under his policy. That he fears that if he fails to pay to the association his policies will lapse, and if he fails to pay to the trust company he will be proceeded against in some way, he does not understand exactly how, for contempt of court. That in his dilem-a he has not yet determined whether or not he can afford to pay at all to either party or even if he should not permit his certificates to lapse. That he has made payments upon his certificates for so long that to let them lapse would cause him great and irreparable injury.

That except for the dilem-a in which the receipt of the trust company's notice placed him he would continue to make his payments to the association and preserve his interests under the certificate. He says that he has seen other members of the association who had received such notices from the trust company, and that he has discussed the situation with them and generally found that they were as much perplexed as to the proper course to pursue as affiant. Ely D. Graff says the statements contained in the foregoing affidavit are true to the best of his knowledge and belief.

ELY D. GRAFF.

Subscribed and sworn to before me by Ely D. Graff this 25th day of August, 1900. My commission expires Jan. 6, 1904.

L. B. BOTTS,
N. P., J. C., Ky.

The stipulation above referred to is as follows:

United States Circuit Court.

THE MUTUAL RESERVE FUND LIFE ASSOCIATION, Complainant,
vs.
THE FIDELITY TRUST & SAFETY VAULT COMPANY, JAMES S. Phelps, Defendants.

42 It is agreed between the complainant and defendants that: The outstanding policies existing between the Mutual Reserve Fund Life Association and citizens of Kentucky were continued in force after the action of October 10th, 1899, of the insurance commissioner of the State ef Kentucky. That said policies were in force continuously up to and including the time of the hearing of the motion to quash the service of summons, and that on said policies the association had collected and were collecting dues, premiums and assessments.

PIRTLE & TRABUE, *For Def't.*

The portion of record filed herein on the 25th day of August, 1900, is as follows:

And on the 26th day of April, 1900, the following affidavit of Chas. W. Camp was filed in court:

STATE OF NEW YORK,
County of New York, Borough of Manhattan, } *ss:*

Charles W. Camp, being duly sworn, deposes and says: I am and have been for more than six years last past the secretary of the Mutual Reserve Fund Life Association. As such secretary it is a part of my duty to keep and record the minutes of the transactions of the board of directors of said association.

Said association is a corporation organized under chapter 175 of the Laws of 1883 of the State of New York, transacting the business of life insurance on the co-operative or assessment plan. In all contracts of insurance made with said association the member or policy-holder is required to remit his dues, premiums or assessments to the home office of the association but the association frequently appoints local treasurers or collectors in cities and towns distant from the home office of said association for the convenience of the members or policy-holders and authorized them to pay said local treasurer or collector instead of remitting direct to the home office of the association. Said local treasurers or collectors are always appointed by resolution of the board of directors, and their sole authority from the association is to receive the dues, premiums or

assessments from such of the policy-holders as reside within the district for which they are appointed local collectors or treasurers. Said local treasurers or collectors are required to comply with the rules and regulations of the association in respect to such treasurers or collectors, and their authority extends no further than is expressed therein.

43 On the 9th day of April, 1896, by a resolution of the board of directors of said Mutual Reserve Fund Life Association, adopted at a meeting held on that day, the Western Bank of Louisville, Kentucky, was appointed a local treasurer for said association. The resolution appointing the said Western bank such local treasurer is recorded in the minutes of the meeting of said board of directors held on said 9th day of April, 1896, in the following words:

"On motion of Director Vrooman, seconded by Director Wells, the Western Bank of Louisville, Kentucky, was appointed a local treasurer to serve as such according to the rules and regulations of the association and during the pleasure of the board — of C. K. Lehrberg, discontinued."

When an assessment is levied by the said association upon its members a list of the members liable therefor is sent to the local treasurer and on the back of said list is printed the rules and regulations of the association governing local treasurers. I annex hereto a blank used by the association in forwarding to such local treasurers the list of members so liable for assessments and on the back of said blank is printed the said rules and regulations which said rules and regulations are those which governed the Western Bank of Louisville, Ky., during the period it served as such local treasurer."

The appointment of said Western bank so made as aforesaid continued until the 12th day of March, 1900, when such appointment was discontinued and annulled.

The said Western bank has never represented the said association in any other capacity than that of local treasurer and its only authority *for* said association was to receive from the members liable to the assessments said assessments when paid in accordance with the terms of the respective contracts held by the said members.

CHARLES W. CAMP.

Sworn to before me this 17th day of April, 1900.

[SEAL.] T. B. CLARKSON,
Notary Public, N. Y. Co.

Know all men by these presents:

At a meeting of the board of directors of the Mutual Reserve Fund Life Association Insurance Company, of the city of New York, in the State of New York, held in the office of the company in said city, on the 10th day of May, 1893, the following resolution was adopted:

44 "Resolved, That the Mutual Reserve Fund Life Association Insurance Company of the city of New York, in the State of New York, having been admitted or having applied for admission to transact business in the State of Kentucky, in conformity with the laws thereof, does hereby consent that service of process upon *and*

any and every agent that is now or may hereafter be acting for said company in Kentucky, or upon the insurance commissioner of said State, shall be valid service upon said company in any action or special proceedings against said company in the State of Kentucky subject to and in accordance with all the provisions of the statutes and laws of said State of Kentucky, now in force, and such other act as may be hereafter passed amendatory thereof and supplementary thereto. And said agent, or said insurance commissioner *are* hereby duly authorized and empowered to acknowledge service or process for and in behalf of said company in the State of Kentucky, in all cases as provided for by the laws of the State of Kentucky, and service of process, mesne or final upon said agent, or said insurance commissioner, shall be taken and held to be as valid as if served upon said company, according to the laws of this or any other State, hereby waiving all claims or writ of error by reason of such acknowledgment or service; and service of process upon such agents, or such insurance commissioner in any county of this State, shall be deemed good and valid, and authorize trial of the cause in the court whence such process issued."

In witness whereof, the said company has to these presents, affixed its corporate seal, and caused the same to be subscribed and attested by the second vice-president and secretary at the city of New York, in the State of New York, on the 10th day of May, A. D. 1893.

[SEAL.] HENRY J. REINMUND,
2nd Vice-President.

F. T. BRAMAN, *Secretary.*

STATE OF KENTUCKY:

Office commissioner of insurance, Frankfort.

Office of insurance commissioner of the State of Kentucky.

FRANKFORT, KY., *October* 10, 1899.

Notice is hereby given that from and after this date, all authority granted by this department to the Mutual Reserve Fund Life
45 Association, of New York, a corporation, organized under and existing by the authority of the laws of the State of New York, together will all licenses issued by this department to agents of the above-named association is revoked.

(Signed) W. H. STONE,
Insurance Commissioner.

(Copy.)

STATE OF KENTUCKY:

Office of commissioner of insurance.

FRANKFORT, *October* 10, 1899.

Charles W. Camp, secretary of the Mutual Reserve Fund Life Association, New York city.

DEAR SIR: I have this day revoked all licenses to agents of your association in this State, as your certificate of authority was not re-

newed when it expired June last. Your company has no authority now to transact business in Kentucky.

Very truly yours,

W. H. STONE,
Insurance Commissioner.

(Copy.)

Insurance department.

FRANKFORT, KY., *March 1st*, 1900.

I, W. H. Stone, insurance commissioner of the State of Kentucky, do hereby certify that I have compared the annexed copies of power of attorney of the Mutual Reserve Fund Life Association revocation of authority of same company and notice of revocation served on sec'y of said Co., with the original on file in this department, and that the same is a correct transcript therefrom, and of the whole of said original. In witness whereof, I have hereunto subscribed my name and affixed my official seal at the city of Frankfort, the day written.

[SEAL.]

W. H. STONE,
Insurance Commissioner,
By WM. E. SWEENEY, *Deputy.*

46 (Copy.)

NEW YORK, *April 9th*, 1896.

Mr. B. Freso, cashier the Western bank, Louisville, Kentucky.

DEAR SIR: It gives me pleasure to advise you that the board of directors have this day appointed the Western Bank of Louisville, Kentucky, as a local treasurer, for that city, such appointment to continue during the pleasure of the board.

The compensation allowed will be two and one-half per cent. (2½ per cent.) upon amounts received and remitted to the home office by New York draft.

Full information will be forwarded to you by due course, and I know it will be your pleasure to be governed by them. The collectors will cause you very little trouble, and I am sure that you will aid us by way of calling the attention of our members, from time to time, to the matter of making payments in accordance with our rules and regulations. Any efforts you may make in this direction will receive the thanks of the home office.

Will you be pleased to signify your acceptance?

This association has made wonderful progress and ranks among the first and foremost of the life insurance companies of the world. We challenge the admiration of our friends and command the respect of our competitors. With best wishes for the success of your institution, I am

Very truly yours, JOHN W. VROOMAN, *Treasurer.*

The Fidelity Trust & Safety Vault Co., receiver in Kentucky of the Mutual Reserve Fund Life Association, 206 Fifth street.

LOUISVILLE, KY., *August* 6, 1900.

DEAR MISS: There is served upon you herewith a true and correct copy of an order entered by the Hon. Sterling B. Toney, in the law and equity division of the Jefferson circuit court on August 4, 1900. As a party interested in and affected by the decree of the court, you are invited to carefully read and consider the printed enclosure.

From a perusal of the court's order, the following facts will be developed:

First. That this company has been appointed receiver in
47 Kentucky of all the business and assets of the Mutual Reserve Life Association of New York.

Second. You are required to and must pay to this company all premiums, dues and assessments, which you may now owe to the Mutual Reserve Fund Life Association, or which may hereafter become due from you to the association. Such payments to this company of debts due the Mutual Reserve Fund Life Association is to continue until you receive instructions from the court to a contrary effect.

Third. Should you after receipt of this notice, pay any money or property of value to the Mutual Reserve Fund Life Association, you make yourself liable to another payment of a like sum or property of the same value to this company, as well as subjecting yourself to punishment by the court for contempt in disobeying its order.

The Fidelity Trust and Safety Vault Company, as receiver, is now ready to receive and receipt for all money and property due or owing to the association hereinbefore referred to.

Respectfully,

FIDELITY TRUST & SAFETY VAULT CO.

Ex. filed Aug. 23, 1900.

The opinion above referred to is as follows:

United States Circuit Court, District of Kentucky.

MUTUAL RESERVE FUND LIFE ASSOCIATION
vs.
JAMES S. PHELPS ET AL. } Opinion.

On the 14th day of July, 1885, James S. Phelps, procured a certificate of membership (otherwise a policy of life insurance) in the complainant association, and at stated periods thereafter paid the dues and the mortuary calls or premiums thereon as stipulated in the certificate. This continued until about January, 1900, a period of nearly fourteen and a half years, and for that length of time, he continuously paid the premiums for carrying the risk. Pursuant to the stipulations of the certificate or policy, as the insurer claimed, the mortuary calls were increased to a higher rate and probably

fixed upon a different plan than the insured thought was
48 permitted by the terms of the certificate, and after the date last named, he refused to pay the increased rates, and on the 28th day of February, 1900, instituted an ordinary action at law, in the State court to recover the entire amount of the calls or premiums so paid by him, together with interest thereon. Upon a service of process, which the State court considered valid and sufficient, judgment in that action was rendered in the plaintiff's favor on May 19th, 1900, for the entire claim then ascertained by the court to be the sum of $2360, for which amount with interest from that date and the cost of the proceeding, judgment was then rendered against the association. It will be seen that this judgment allowed to the insurer no compensation whatever for the risk it had taken and carried for the fourteen and a half years, during which the certificate or policy had been in force, and the premiums and calls had been paid. On the 21st day of May, 1900, an execution of *fieri facias* was issued upon the judgment, and was placed in the hands of the sheriff of the proper county who subsequently, namely, on June 12th, 1900, returned the writ in substance, "no property found." More than sixty days after the judgment, to wit, on the 4th day of August, 1900, the plaintiff in that action filed therein an amended and supplemental petition, seeking to obtain satisfaction of the judgment by subjecting the assets and credits of the insurer in Kentucky, and which consisted of the mortuary calls and premiums afterwards to become due from other insurers upon like certificates or policies, and upon considering this last paper the State court, although no process had been issued upon it, nor any notice of it given to the association on the same day of its being filed, transferred it to the equity docket, acted upon it, and appointed the Fidelity Trust & Safety Vault Company receiver for the complainant in Kentucky, and directed it to collect all the revenues and income from the members or policy-holders, and also ordered them, under threat of contempt, to pay the same as they accrued to the said receiver, although none of them were parties to the action, nor had any of them been summoned to answer as garnishees.

After unsuccessfully attempting to file a petition for the removal of that action to this court, on the 22nd day of August, 1900, and after an equally unsuccessful attempt to have the bond tendered therewith approved by that court as sufficient, the complainant begun this action seeking to enjoin the efforts of the defendants, Phelps and The Fidelity Trust and Safety Vault Co., to reduce any of complainant's revenues or income, to their possession upon
49 grounds set forth in the bill of complaint that the last steps taken in the State court were void, that its policy-holders were very numerous, and a great multiplicity of actions would otherwise result. Whether the judgment in the State court action was valid as being based upon a sufficient service of process we need not inquire at this stage of the proceeding. As the defendants are estopped from denying its validity we shall assume it to be valid for the purposes of the inquiry before us, only remarking that in the late case of Swann *vs.* M. R. F. Life Association, 100 Fed. Rep. 922,

we had occasion to pass upon a somewhat kindred question, though not in that case inquiring into the nature of the agency of a "local treasurer," such as Mr. Frese appears possibly to have been in this case. That may become an important question in the future progress of this case, when the character of his agency, if any, is disclosed, but it is not so at present.

Whether the fund raised by the complainant from mortuary calls and premiums through its manner of insuring is a trust fund for all its members and beneficiaries which cannot be diverted to the benefit of a mere creditor, who is not now a member and for that reason possibly not entitled to participate as such, he not having contributed to the joint fund to be raised upon future mortuary calls, is an important question, though it need not now receive more than an incidental consideration. Ordinarily we might say that such a fund could not be subjected to a creditor's demand in a case like the one in the State court and by process which, if anything, is substantially that of garnishment. In this case, where the mortuary calls as shown by defendant Phelps in his pleading in the State court, are a trust fund to pay the losses of the contributors to it, the matter seems even clearer. Whether a premium or a mortuary call yet to be paid for life insurance, where the policy can only be kept alive by its payment, is a subject of any species of garnishment by creditors in the hands of the policy-holder, is another question which may become of much moment. Ordinarily we would certainly say that it was not a debt due to the insurer at all, nor an asset belonging to it until it was actually paid. The relation of insurer and insured admits of the construction only that the insured may purchase the insurance for a prescribed period by voluntarily and at his option paying the premium. This and the plan of insurance offered by the complainant may be slightly different, but if the mortuary calls are not paid the certificate of membership must in all cases lapse. So that if the policy lapse the insured has got nothing for his money. He has only paid a portion of a debt of the insurer if what he is about to pay for the purchase of insurance for the future is taken from him for another and different purpose. If may be assumed to be at least extremely doubtful whether premiums or mortuary calls, not being in any sense debts, but only a cash payment, for the purchase, at the option of the insured, of some future benefit, can in any sense be garnishable. If they can, the policy-holder will lose and the insurance company gain. The policies and all accumulations, if any, may be forfeited for non-payment to the company and the money, instead of paying for insurance, may be most unjustly diverted to the payment of the insurance company's debt. Justice to the policy-holders and every consideration, therefore, would seem to enforce the conclusion that the accruing premiums or calls cannot be garnisheed by any mere creditor of the company.

Section 720 of the Revised Statutes of the United States forbids the issuing by this court of any injunction against any proceedings in a State court, except in bankruptcy matters. This necessarily means a pending and not a past or terminated suit. The statute is

a wise one, as nothing could be more incongruous and unseemly than for the courts of the United States to attempt to control by their processes the ordinary actions of the State courts. Of course this does not mean that if this court first acquired jurisdiction of a subject-matter, or if a case had been lawfully removed here, that in some instances in support of its own jurisdiction the parties thereto might not be directly operated upon by the court, but the statute otherwise plainly forbids this court to enjoin a proceeding in the State court, and this rule is extended to the officers of that court as an inherent part of it. And this court will not enjoin a proceeding of the State court in this instance if one is there pending. It is, therefore, of the utmost importance to ascertain whether since the final judgment in the ordinary action at law was rendered on May 19th, 1900, there has been any pending proceeding in the State court within the meaning of the law, or whether there is any proceeding now pending there within the meaning of that statute. If the defendants are mere wrong-doers, and if their threatened actions are injurious to the complainant, different results will follow.

Assuming it to be valid, the court is clearly of opinion that from and after the rendition of that judgment on that date that
51 action was *functus officio* for all purposes of pleading. Its force was spent, and all steps attempted to be taken thereafter, except in way of writs for the execution of the judgment, were *coram non judice*, and void. Brown *vs.* Vancleave, 86 Ky. 381; Meadows *vs.* Goff, 90 Ky. 540.

Pursuant to these authorities and many others to the same effect, which might be cited, the filing of the supplemental petition and the action of the court appointing a receiver thereupon will be treated as mere nullities. Into a suit at law that was already terminated by final judgment, and which was therefore off the docket, a supplemental pleading was sought to be injected seeking its enforcement by merely equitable proceedings. No summons was issued upon it. No notice of it was given to the party most interested in it, and it was acted upon and disposed of by the court immediately. No attachment was issued under which property was seized or garnishees summoned as a foundation of possible jurisdiction of a *res* and, in short, the whole so-called supplemental proceeding was an attempt to graft a live branch upon a dead stock. This must be a futile effort. A transfer to the equity docket of what was of no legal vitality did not aid nor strengthen it.

The attempted proceeding was not authorized by any of the provisions of the Civil Code regulating attachments. Those provisions obviously apply to cases altogether different from this. Especially does not section 227 apply. It provides for the case of a garnishee actually summoned as such in the action whose answer is not satisfactory. In that event a supplemental petition may be filed in the original case, which, indeed, as to him has never been terminated by final judgment. Here there is nothing in the slightest degree resembling that, as no attachment was issued nor garnishees summoned.

Nor do sections 298 and 299 of the Civil Code (ed. '99) authorize

the appointment of a receiver in such a case, and certainly not in such a manner.

Assuming, for the purposes of this motion only, that the judgment of May, 1900, was valid, and regarding the action in the State court as having terminated at the time of its rendition, and as thereafter only providing support to writs for the collection of the judgment, or for a separate suit in equity under section 439 of the Code, the petition for the removal came too late, though whether the necessary jurisdictional amount is involved, may present at some time an interesting question. The judgment was for $2360 and interest thereon from its date and for costs. Whether the more than
52 $360 of interest manifestly included in the $2360 then merged into and became part of the principal in the sense of the removal acts may yet demand attention. At present, however, it seems immaterial.

The orders appointing the Fidelity Trust and Safety Vault Company receiver being simply nullities, that company is not an officer of the State court, and enjoining it in no way enjoins a proceeding in the State tribunal. This being so, the facts stated in the bill of complaint seem to present sufficient grounds for the temporary injunction prayed for against the defendant, The Fidelity Trust and Safety Vault Co., and also against the defendant Phelps, except that he should be left at full liberty to collect his judgment by all lawful means other than by subjecting thereto the mortuary calls, assessments, premiums and dues accruing upon the certificates or policies of members of the complainant association, to which, as we have seen, he has as yet manifested no right.

This court could not enjoin the execution of any of the writs for enforcing the judgment, and it might be the same if the insured in this case had, before complainant's bill was filed, brought an action in equity under section 439 of the Civil Code to enforce his judgment. The Kentucky Code of Practice, section 5, prescribed two separate kinds of actions. One of these is an ordinary action at law; the other an equitable action. In Davidson *vs.* Simmons, 11 Bush, 333, the court of appeals of Kentucky held that the action in equity provided for in that section (then section 474) was the only action allowed by the laws of Kentucky to enforce a judgment at law. That remedy by suit is exclusive. The amended and supplemental petition in the State court in this instance, even though transferred from the law docket to the equity docket was in no sense a suit in equity, nor for the reasons already given can it be regarded as a legal proceeding at all. It can only be considered as a vain thing. Of course, the State might have authorized such steps as those last taken in its court, but it has not done so in its Code of Practice or otherwise as the cited authorities demonstrate.

The holders of certificates in the complainant association in Kentucky appear to be numerous, and a mortuary call has been made which is due in a few days. Their payment to any person except the association may result in the lapse of many certificates and in irreparable injury to many members unless they pay both to the re-

ceiver and to the association. Much confusion is inevitable.
53 A multiplicity of suits seems unavoidable and the business of the complainant may be most seriously affected by what we have seen are wholly maintainable proceedings. Besides it has the right to protect that trust fund. We have also seen that those mortuary calls cannot properly be the subject of any form of garnishment.

Manifestly there is no adequate remedy at law for this state of things, and an injunction *pendente lite* is granted as prayed in the bill, with the modification indicated as to defendant Phelps.

Aug. 25, 1900.

WALTER EVANS, *Judge.*

In the Circuit Court of the United States for the Sixth Circuit.

MUTUAL RESERVE FUND LIFE ASSOCIATION, Plaintiff,
vs.
FIDELITY TRUST & SAFETY VAULT CO., &c., Defendants.

Demurrer for Lack of Jurisdiction and Equity.

Come the defendants, Fidelity Trust & Safety Vault Co., receiver of the Mutual Reserve Fund Life Association of Kentucky, for the special purpose and no other, until the question herein raised is decided of objecting to the jurisdiction of this court, by protestation, not confessing or acknowledging all or any part of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, demurs to the said bill and for cause of demurrer shows: First, that it appears by the plaintiff's own showing by the said bill that it is not entitled to the relief prayed by said bill against this defendant.

Second. That it appears from said bill of complaint of the plaintiff that this court has no jurisdiction to hear and determine this action; (*a*) the amount involved in this controversy is $1994.50, with interest, which amount is not sufficient to give this court jurisdiction of this cause; (*b*) this court is denied jurisdiction herein and precluded from a hearing of this action by reason of section 720 of the Revised Statutes of the United States.

Third. That said bill of complaint of the plaintiff is wholly without equity.

54 Wherefore, and for divers other good causes of demurrer appearing on said bill, this defendant demurs thereto, and it prays a judgment of this honorable court whether it shall be compelled to make further or any answer to the said bill; and it humbly prays to be hence dismissed with its reasonable costs in its behalf sustained.

ZACK PHELPS AND
B. F. WASHER,
Att'ys for Fidelity Trust & Safety Vault Co., &c.

DISTRICT OF KENTUCKY, *County of Jefferson,* } ss:

John Stites makes solemn oath and says that he is president of the above-named defendant, Fidelity Trust & Safety Vault Co., and that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

JOHN STITES.

Subscribed and sworn to before me this 25th day of Aug. 1900. My commission expires 12th day of January, 1902.

FREDERICK FORCHT, JR.,
Notary Public, Jefferson Co., Ky.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

——— ———,
Of Counsel for Defendant.

Filed Aug. 25, 1900.

THOS. SPEED, *Clerk.*

And on another day of said term of said court, to wit, on the 2nd day of February, A. D. 1901, came the complainant by Pirtle & Trabue, counsel; came also the defendants, by Zack Phelps and B. F. Washer, their counsel, and moved the court to dissolve the injunction heretofore issued in this cause, upon written grounds, which are filed.

This action coming on to be heard, on the motion of the defendants to dissolve the preliminary injunction issued herein, and the motion having been submitted and duly considered, and the court being advised, it is now ordered that the said motion be and the same is hereby overruled at the defendants' cost.

55 From the foregoing decree, defendants pray an appeal to the United States circuit court of appeals for the sixth circuit, which is hereby granted, upon the defendants' execution of a bond as required by law in the sum of $250.00. Thereupon came defendants and tendered said bond, with Zack Phelps as surety, which bond is approved.

The grounds to dissolve injunction, above referred to, are as follows:

United States Circuit Court for the Sixth Circuit, District of Kentucky.

MUTUAL RESERVE FUND LIFE ASSOCIATION, Complainant,
vs.
JAMES S. PHELPS and FIDELITY TRUST & SAFETY VAULT CO., Receiver, etc., Defendants.

The defendants, James S. Phelps and The Fidelity Trust & Safety Vault Company, receiver, etc., now come and by their counsel, Zack Phelps and Benjamin F. Washer, *and* move the court to dissolve

the injunction heretofore issued in this case. In support of and as grounds for said motion, the defendants as aforesaid would represent:

(1.) That this court had no power, right, authority or jurisdiction to issue the injuction hereinbefore referred to. Said injunction has been granted to stay proceedings now pending in the law & equity division of the Jefferson circuit court, a court of competent jurisdiction of the State of Kentucky. Section 720 of the Revised Statutes of the United States provides that "a writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The injunction aforesaid has not been authorized by any law relating to proceedings in bankruptcy, and this court is therefore prohibited by the provision of the Revised Statutes just quoted from issuing or promulgating the order of injunction as mentioned.

(2.) This court is without power, right, authority or juris-
56 diction to issue the injunction aforesaid, because this suit does not involve matters exceeding the sum or value of two thousand dollars, exclusive of interest and costs. The matter here in dispute involves only the sum of one thousand nine hundred and ninety-four dollars and sixty cents, with interest, and such a sum is not sufficient to vest this court with jurisdiction to hear or determine the controversy attempted to be alleged in complainant's bill.

ZACK PHELPS,
BENJAMIN F. WASHER,
Att'ys for Defendants.

The petition for appeal, above referred to, is as follows:

United States Circuit Court for the Sixth Circuit, District of Kentucky.

MUTUAL RESERVE FUND LIFE ASSOCIATION, Complainant,
vs.
JAMES S. PHELPS and FIDELITY TRUST & SAFETY VAULT CO., Receiver, etc., Defendants.

Petition for Appeal.

The defendants, James S. Phelps and the Fidelity Trust and Safety Vault Company, receiver, etc., jointly and separately conceiving themselves aggrieved by the order refusing the defendants' application to dissolve the preliminary injunction herein issued, appeal from said order to the United States circuit court of appeals for the sixth circuit. Defendants file herewith, as reasons and grounds, their assignment of errors and pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States circuit court of appeals for the sixth circuit.

The order refusing to dissolve said preliminary injunction as

aforesaid is of date February 2nd, 1901, and is a part of the record herein.

ZACK PHELPS,
BENJAMIN F. WASHER,
Counsel for Defendants.

57 The assignment of errors, above referred to, is as follows:

United States Circuit Court for the Sixth Circuit, District of Kentucky.

MUTUAL RESERVE FUND LIFE ASSOCIATION, Complainant,
vs.
JAMES S. PHELPS and FIDELITY TRUST & SAFETY VAULT CO., Receiver, etc., Defendants.

Assignment of Errors.

The defendants, James S. Phelps and The Fidelity Trust and Safety Vault Company, receiver, etc., come and by their counsel, Zack Phelps and Benjamin F. Washer, *and* represent that the order of this court entered herein on February 2nd, 1901, refusing the application of the defendants to dissolve the preliminary injunction, hereinbefore issued, is erroneous and against the just rights of the defendants, for the following reasons:

(1.) That this court had no right, power, authority or jurisdiction to issue the injunction hereinbefore referred to. Said injunction has been granted to stay proceedings now pending in the law & equity division of the Jefferson circuit court, a court of competent jurisdiction of the State of Kentucky. Section 720 of the Revised Statutes of the United States provides that "a writ of injunction shall not be granted by any court of the United States where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The injunction aforesaid has not been authorized by any law relating to proceedings in bankruptcy, and this court is therefore prohibited by the provision of the Revised Statutes just quoted from issuing or promulgating the order of injunction as mentioned.

(2.) This court is without right, power, authority or jurisdiction to issue the injunction aforesaid, because this suit does not involve matters exceeding the sum of two thousand dollars, exclusive of interest and costs. The matter here in dispute involves only the sum of one thousand nine hundred and ninety-four dollars and sixty cents, with interest, and such sum is not sufficient to vest this court with jurisdiction to hear or determine the controversy attempted to be alleged in complainant's bill.

58 Wherefore said defendants pray that the order and action of this court as aforesaid be reversed and that the said court may be directed and required to sustain the motion of defendants to dissolve said preliminary injunction issued herein, as of right said motion should be sustained.

ZACH PHELPS,
BENJAMIN F. WASHER,
Counsel for Defendants.

The appeal bond above referred to is as follows:

Circuit Court of the United States, District of Kentucky.

MUTUAL RESERVE FUND LIFE ASSOCIATION
vs.
JAMES S. PHELPS ET AL.

Know all men by these presents, that we, James S. Phelps, and the Fidelity Trust and Safety Vault Company, and Zack Phelps, are held and firmly bound unto the Mutual Reserve Fund Life Association in the sum of two hundred and fifty dollars, to be paid to the said Mutual Reserve Fund Life Association, executors or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 2nd day of February, A. D. 1901.

Whereas, the above-named James S. Phelps, and the Fidelity Trust and Safety Vault Company, *hath* prosecuted an appeal to the United States circuit court of appeals for the sixth circuit, to reverse the decree rendered in the above-entitled suit, by the circuit court of the United States for the district of Kentucky, at Louisville.

Now, therefore, the condition of this obligation is such that if the above-named James S. Phelps and the Fidelity Trust and Safety Vault Company shall prosecute their said appeal to effect, and answer all costs, if they shall fail to make good their plea,
59 then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JAMES S. PHELPS, [L. S.]
By BENJ. F. WASHER, *Att'y.*
FIDELITY TRUST & SAFETY VAULT CO., [L. S.]
By BENJ. F. WASHER, *Att'y.*
ZACK PHELPS. [L. S.]

Sealed and delivered in the presence of
HENRY F. CASSIN,
Deputy Clerk, U. S. Courts.

United States Circuit Court, Sixth Circuit, District of Kentucky.

MUTUAL RESERVE FUND LIFE ASSOCIATION, Complainant,
vs.
JAMES S. PHELPS and FIDELITY TRUST & SAFETY VAULT COMPANY, Defendants.

Stipulation.

To shorten the record for appeal by eliminating unnecessary matter, it is stipulated:

1. That the clerk omit, in copying the record, the exhibits filed with the affidavit of Charles K. Lehrberg, August 25th, 1900, such

exhibits consisting of notice of mortuary call No. 111 and sample copies of the certificates of membership issued by complainant and referred to in the affidavit.

2. The following parts of the transcript of proceedings, in the State's court, filed with the bill of complaint as an exhibit therewith, viz:

a. Copy of the certificates of membership of the defendant in this suit, plaintiff in the suit in the State court, James S. Phelps.

2. Account, filed by said Phelps with his petition in the State court, of the dues and other sums paid by him as alleged in his petition.

c. The receipt of the association to Phelps for $84.60, countersigned November 1st, and receipt for $70.95, said receipts being identical in form with the receipt remaining in the record.

d. Notary's jurat to affidavit of Chas. W. Camp.

60 *e.* Collection list filed therewith (p. 4).

f. Certificates of John H. Page, clerk of the State court, to transcripts, it being admitted that the transcripts were duly certified.

g. Petition of Attilla Cox, to State court for advice.

PIRTLE & TRABUE,
For Complainant.
ZACK PHELPS,
BENJ. F. WASHER,
For Defendants.

Filed February 13, 1901.

DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the United States circuit court for the district of Kentucky, at Louisville, do hereby certify that the foregoing 68 pages contain a true and correct transcript of the record and proceedings in the case of Mutual Reserve Fund Life Association *vs.* James S. Phelps *et al.*, No. 6821, according to the stipulation of counsel filed herein, as appears from the files and records in my said office.

Witness my hand and seal of said court, this — day of February, 1901.

[SEAL.]

THOS. SPEED, *Clerk,*
By HENRY F. CASSIN, *D. C.*

61 And afterwards to wit on March 2nd 1901, præcipe for appearance of counsel was filed clothed in the words and figures as follows:

62 United States Circuit Court of Appeals for the Sixth Circuit, October Term, 1900.

JAMES S. PHELPS ET AL.
vs.
MUTUAL RESERVE FUND LIFE ASSOCIATION. } No. 955.

To the clerk of said court:

Please enter *my* appearance as counsel for the appellants.

ZACK PHELPS.
BENJAMIN F. WASHER.

☞ NOTE.—Must be signed by a member of the bar of Supreme Court of the United States or of any circuit court of the United States, and by individual (not firm) name.

[Endorsed:] No. 955. United States circuit court of appeals for the sixth circuit. October term, 189–. Appearance. Filed March 2, 1901. Frank O. Loveland, clerk of U. S. circuit court of appeals for the sixth circuit.

63 And afterwards to wit on October 23rd 1901 an entry was made upon the journal of said court in said cause which reads and is follows:

United States Circuit Court of Appeals for the Sixth Circuit.

JAMES S. PHELPS ET AL.
vs.
MUTUAL RESERVE FUND LIFE ASSOCIATION. } Before Lurton, Day, and Severens, JJ.

This cause is argued for appellants by Mr. Benj. F. Washer and for appellee by Mr. E. F. Trabue and is submitted.

And afterwards to wit on December 3rd 1901, a decree was entered in said cause which is in the words and figures as follows:

Decree.

64 United States Circuit Court of Appeals for the Sixth Circuit.

JAMES S. PHELPS and THE FIDELITY TRUST & SAFETY VAULT CO.
v.
MUTUAL RESERVE FUND LIFE ASSOCIATION. } No. 955.

Appeal from the circuit court of the United States for the district of Kentucky.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and

decreed by this court, that the decree of the said circuit court, in this cause be and the same is hereby reversed with costs and the cause is remanded to the said circuit court with directions to dissolve the injunction.

65 And afterwards to wit on December 24th 1901, an opinion was filed in said cause clothed in the words and figures as follows:

Opinion.

66 United States Circuit Court of Appeals, Sixth Circuit.

JAMES S. PHELPS ET AL., Appellants,
vs.
MUTUAL RESERVE FUND LIFE ASS'N, Appellee. } No. 955.

Appeal from the circuit court of the United States for the district of Kentucky.

Submitted Oct. 23, 1901; decided Dec. 3, 1901.

Before Lurton, Day, and Severens, circuit judges.

This is an appeal from a decree continuing an interlocutory injunction. The case is briefly this:

The appellee, The Mutual Reserve Fund Life Association, is a corporation organized under the laws of the State of New York. For many years it solicited insurance in the State of Kentucky, having complied with the law of that State in respect of the conditions upon which foreign insurance companies are permitted to do business in the State. As preliminary to being licensed its board of directors passed a resolution consenting that service of process in suits brought against it in Kentucky might be made upon the insurance commissioner of the State, and that such service should be a valid service upon the association.

October 10, 1899, the Kentucky insurance commissioner revoked all authority theretofore granted by his department, and all licenses granted to its agents to do business within the State. In this situation of things, suit was brought against the association, in the Jefferson circuit court, one of the courts of the State of Kentucky, having both common-law and equity jurisdiction, by James S. Phelps, one of the appellants. Phelps had, for many years, been a member of the association, and held a policy of life insurance therein.

67 He claimed that the company had, without his consent, violated the terms and conditions of its contract with him, and, in effect, had annulled and canceled its agreement with him, by the imposition of new and illegal arbitrary conditions. He, therefore, sued to recover back the dues, premiums and assessments paid by him theretofore, aggregating $1,994.20.

Process issued against the said association, which was returned served upon the insurance commissioner of the State of Kentucky, and upon one Ben Frese, who was described in the return as "the

managing agent and chief officer and agent of the Mutual Reserve Fund Life Association found in this county."

The association appeared specially and solely for the purpose of challenging the sufficiency of this service of the writ of summons, and moved to quash the return. Upon this motion, evidence was heard, involving the character of the agency of B. Frese, as well as the sufficiency of the service upon the State insurance commissioner after revocation of the company's license to do business within the State. Upon the evidence and exhibits, the circuit judge made a finding of fact and law which was in substance; first, that the resolution of the board of directors of the association, consenting that service upon the Kentucky insurance commissioner of process issuing in any suit pending, or which might be brought in the courts of the State, should be a valid service, had never been revoked or canceled and that the service of process in this suit upon the said commissioner was a good and valid service; second, that Ben Frese, at the time of service upon him, "was the local treasurer of the defendant association in Jefferson county, and, as such, was an agent of the company upon whom summons might be served."

The motion to quash was accordingly overruled. The defendant declined to plead further, and judgment by default was rendered for the sum of $1,994, with interest on the various items from date of each payment, respectively. This judgment for the principal sum and interest aggregated $2,360. Execution issued which was returned "no property found." Thereupon, the plaintiff in the said judgment, by leave of court, filed in the said Jefferson circuit court, and in the same case, a pleading, styled an "amended and supplemental petition." In this he set out the fact of his said judgment, and that execution had been duly returned "no property found," and that his said judgment was wholly unpaid. It was then in substance averred:

That the said association, at the time its license to do busi-
68 ness in the State had been withdrawn, had a great number of policy-holders in the State, which policies were a large source of income to the association, and that it had continued to do business within the State by collecting dues, premiums and assessments upon its said existing contracts, and that at stated times dues, premiums and assessments became due from said Kentucky policy-holders, which the company regularly demanded and received, as a condition of keeping in force its said contracts.

It was also averred that prior to December, 1899, such policy-holders had paid all dues, premiums and assessments to local collectors and treasurers, who were appointed at different places within the State for the purpose of receiving such dues, premiums and assessments accruing to the association, but that since December, 1899, the authority of all such collectors and treasurers had been revoked, and the company's debtors and policy-holders notified and required to forward all such dues, premiums and assessments directly to the home office of the association, in New York. This method of doing business, the petition averred, was adopted for the purpose of evading the service of process within the State, while so still carrying

on business in the State, and for the fraudulent purpose of removing its assets out of the State to evade the process of the law, and the payment of local creditors, and particularly with the intent of preventing this plaintiff in the collection and realization of the amount due upon his said judgment. The prayer of the petition was in these words:

"Wherefore, the plaintiff prays for a decree in aid of and in the enforcement of the judgment heretofore rendered in this court, and to this end plaintiff prays that a general attachment issue against the property of the defendant, The Mutual Reserve Fund Life Association; that the defendant and all persons now or heretofore connected with said defendant be required to appear before the commissioner of this court, and disclose any money, choses in action, equitable or legal interest, and all other property to which the defendant is entitled *to* or *to* which he has an interest; or if it seems best to the court, the plaintiff prays that a receiver be appointed to take charge of the business, assets and all other property of every kind and description which the defendant has in Kentucky or may hereafter obtain in this State, that all revenues and incomes accruing to the defendant from policy-holders and other debtors be ordered paid to said receiver; and that so much as may be necessary of any money or property belonging to the defendant as may, by any order or process, come within the jurisdiction of this
69 court be employed to the settlement and satisfaction of the judgment which the plaintiff holds against the defendant, as set forth and mentioned herein. Plaintiff prays for his costs in this action, and for all other relief, general, equitable and special."

The final judgment in favor of said James S. Phelps was rendered May 19, 1900. This amended or supplemental petition was filed August 4, 1900, and on the same day the said Jefferson circuit court made an order, entitled as in the original suit, directing that the petition be filed and the action transferred to the equity docket. By the same order the court appointed the appellee, The Fidelity Trust and Safety Vault Company, receiver for the Mutual Reserve Fund Life Association in Kentucky, and directed it to "collect and receive all moneys, debts, things in action and credits now owing to or hereafter to accrue to the said Mutual Reserve Fund Life Association in Kentucky. * * *" That the said receivers "shall take into possession all the revenue and income which has accrued or may accrue to the defendant from its business in this State and policy-holders." It was further ordered that, "all persons insured in said association and all other debtors of said association in Kentucky are now specifically ordered and directed to pay to the receiver herein appointed all dues, premiums, assessments and whatever else of value may now be or hereafter become owing or due to the said defendant association."

The receiver was authorized to employ counsel and to bring and defend all suits necessary to recover the assets of the association and all persons were enjoined from interfering with him in the custody, management and control of the assets and rights "hereby impounded and placed in the hands of said receiver," who was directed

to hold the same for the satisfaction of the judgment of said petitioner, Phelps, and of the costs and expenses of the receivership.

It was directed that "when such judgment shall be paid and such costs and expenses liquidated, the receivership provided for herein shall terminate." The receiver was further directed to make report from time to time of all his acts and proceedings. The receiver qualified on the same day, by giving the bond required by the court.

On August 22d, following, the said Mutual Reserve Fund Life Association, appearing for the sole purpose of filing a petition for the removal of said action, did file a petition praying the removal of said proceeding which was described "as an equitable action ap-
70 parently based or sought to be maintained upon the statutory authority of section 439 of the Code of Practice in Civil Cases, based upon a return" of *null bona*, etc. * * * It was averred that the amount in controversy exceeded $2,000, being $2,360, with interest from May 18, 1900. That the petitioner was a corporation of the State of New York, and that the plaintiff in said proceedings was a citizen and inhabitant of the State of Kentucky. Bond, conditioned as required by law, was tendered. The application to remove was denied.

Thereupon, the said Mutual Reserve Fund Life Association, for brevity, hereafter called the "association," filed the present bill in the circuit court below, the said James S. Phelps, plaintiff in said judgment, and The Fidelity Trust and Safety Vault Company, a corporation of the State of Kentucky, being sole defendants.

The averments of this bill were substantially the facts already stated, and need not be repeated. A duly certified transcript of all the proceedings in the Jefferson circuit court was made an exhibit to said bill. It was further averred that said receiver so appointed had caused to be issued to all of the holders of policies residing in Kentucky, notice of his appointment and of the order of the court requiring all dues, premiums and assessments to be paid to him and warning them that payments thereafter to the association would be ineffectual in respect to dues then or thereafter accruing. The judgment in favor of Phelps was asserted as null and void for want of due notice and service of valid process. It was further averred that no notice of any kind or character had been given of the filing of the "amended and supplemental petition,' under which a receiver had been appointed. This, it was averred, was a proceeding without due process of law, and in violation of the provisions of the fourteenth amendment.

The object of the bill is fully shown by its prayer, which was as follows:

"Your orator prays the aid of this honorable court, and that it may please your honors to grant unto your orator a writ of injunction commanding the said defendants, and each of them, and all persons claiming to act under their authority, or the authority, direction or control of either of them, to absolutely desist and refrain from taking possession of or in any wise interfering with any of the

assets or estate of your orator in the State of Kentucky, and from collecting or receiving any moneys, things in action, credits, income or revenues now owing to or hereafter to accrue to your orator, and especially the dues, premiums and assessments payable to your orator by its members by virtue of the terms of their certificates of membership, and from taking or instituting any action or other proceedings against said members, or any of them, to collect or realize such dues, premiums or assessments, or to prevent them, or any of them, from paying over to your orator, according to the stipulations and provisions of their certificates of membership, all dues, premiums and assessments payable according to the tenor thereof, until otherwise ordered by your honors; and that upon final hearing the injunction herein prayed be made perpetual."

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After notice and argument by counsel the court below granted an interlocutory injunction in these words:

"The defendants, James S. Phelps and The Fidelity Trust and Safety Vault Company, and all its officers and agents, are severally hereby enjoined and restrained from collecting or attempting to collect and from reducing or attempting to reduce to possession, and from in anywise interfering with or claiming any of the revenue or income of the complainant derived from any of the dues, assessments, mortuary calls or premiums which have accrued or which may accrue or be made upon any of the certificates of membership or policies of life insurance issued by complainant to any person or persons whatsoever, but the defendant, James S. Phelps, is left at full liberty to proceed otherwise to enforce against any other property or assets of the complainant any judgment he may have against the complainant by all lawful writs or processes as he may be advised."

A motion to discharge this injunction was subsequently made and overruled, and from this order continuing this injunction this appeal has been prayed.

LURTON, circuit judge, after making the foregoing statement of the case, delivered the opinion of the court:

1. The judgment in favor of appellant, James S. Phelps, and against the appellees, The Mutual Reserve Fund Life Association, has been assailed because it is said that the Jefferson county circuit court did not obtain jurisdiction by the service of process upon Ben Frese, as a local agent or by the service upon the Kentucky commissioner of insurance. But the association appeared in the Jefferson court for the very purpose of putting in issue the sufficiency of that service. The determination of the issue thus made up involved questions of law and fact. The judgment of the State court contains these recitations:

"This action having heretofore been submitted upon a motion to quash the service of process. Upon which motion the court made the following findings of law and facts which are incorporated in and made a part of this judgment, to wit:

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"First. Upon proof induced by affidavits the court was and is of the opinion that Ben Frese at the time of service of summons upon him in this action was the local treasurer of the defendant associa-

tion in Jefferson county, Kentucky, and as such was an agent of the company upon whom summons might be served, and the defendant association thereby brought before the court. By the summons herein upon the said Ben Frese, the defendant association was brought before this court in this action, and the jurisdiction of this court to grant the relief prayed for in the petition became vested.

"Second. It appearing from proof induced by affidavits that the defendant association did, by resolution of its board of directors adopted prior to the service of summons in this action, consent that service of process upon commissioner of insurance of this State in any action, brought or pending in this State, should and shall be a valid service upon said defendant association, and it further appearing to the court that the authority and power to receive service of process thus vested in the commissioner of insurance of Kentucky has never been revoked, canceled or annulled, this court held and now holds that the summons served upon the commissioner of insurance of Kentucky, in this action was a valid and sufficient service, and operated to bring the defendant association before the court, and subject said defendant association to the jurisdiction and decrees of this court in this action.

"This action having now been regularly set at rules and called by the court and the necessary time for answer having elapsed without any action being taken by the defendant, the cause was regularly submitted for judgment. The court being advised by the uncontroverted allegations of the petition, that the prayer of said petition should be granted, it is, therefore, ordered and adjudged that the plaintiff recover of the defendant the sum of nineteen hundred and ninety-four ($1,994) dollars, with interest on the various amounts going to make up said sum from the dates of the payments of such various amounts to the defendant association, as shown by the itemized statement and account filed with the petition; amounting in all to twenty-three hundred and sixty ($2,360) dollars, with interest from this date, May 19, 1900, and that plaintiff further recover of defendant his costs in this action expended, for all of which debt, interest and costs the plaintiff may have immediate execution."

Having appeared for the purpose of challenging the jurisdiction of the court, the decision of the court upon that issue is conclusive, until annulled or reversed by some court having jurisdiction to revise and correct error.

However erroneous the conclusions of the Jefferson circuit
73 court may have been, and we intimate nothing in that respect, its judgment is certainly not void, and in a proceeding of this kind we must accept it as a valid and legal judgment, for neither the circuit court nor this court have any character of appellate or revisory jurisdiction over that court. The question is not one of waiver of personal jurisdiction by an appearance solely for the purpose of contesting that jurisdiction, but of the effect and force, in a collateral attack, of a judgment upon an issue involving the jurisdiction of the court over the person of a defendant, to which issue the

present appellant was a party. The court below was, therefore, right in assuming the validity of the judgment which was the foundation for the subsequent proceedings which led to the injunction here involved.

2. We are unable to agree with the opinion of the court below that the jurisdiction of the State circuit court was exhausted by the rendition of its judgment. The power to render that judgment included the power to issue all proper process to enforce its payment. The jurisdiction of the court over the controversy and over the parties acquired in the primary case by service of process continued until its judgment should be satisfied. This is a well-settled rule in respect to the jurisdiction of courts of record. Wayman *v.* Southard, 10 Wheaton, 1, 22; Riggs *v.* Johnson County, 6 Wall. 166, 187, 197; Covell *v.* Heyman, 111 U. S. 176, 183; Rio Grande R'd *v.* Gomila, 132 U. S. 483, 478.

Riggs *v.* Johnson County, cited above, is much in point. In that case a judgment had been rendered against Johnson county upon bonds. An execution was returned unsatisfied. The plaintiff then applied for a writ of mandamus to compel the levy of a tax under a law in force when the bonds were issued. The officials against whom the writ was directed replied that prior to the application for the writ of mandamus they had been enjoined by a State court from making any levy. This raised a question as to which of the two courts should be obeyed and the decision was made to turn upon priority of jurisdiction over the controvery. In respect to the power of the circuit court to issue a writ of mandamus after judgment and in aid of its enforcement, the court said:

"Jurisdiction is defined to be the power to hear and determine the subject-matter in controversy in the suit before the court, and the rule is universal, that if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree.

"Express determination of this court is, that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied. Consequently, a writ of error will lie when a party is aggrieved in the foundation, proceedings, judgment, or execution of a suit in a court of record.

"Process subsequent to judgment is as essential to jurisdic-
74 tion as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution."

In answer to the argument that the State court had first obtained possession of the controversy by issuing its injunction before application made from the writ of mandamus, the court said:

"Unless it be held that the application of the plaintiff for the writ is a new suit, it is quite clear the proposition is wholly untenable. Theory of the plaintiff is, that the writ of mandamus, in a case like the present, is a writ in aid of jurisdiction which has previously attached, and that, in such cases, it is a process ancillary to the judgment, and is the proper substitute for the ordinary process of execution, to enforce the payment of the same, as provided in the

contract. Grant that such is the nature and character of the writ, as applied in such a case, and it is clear that the proposition of the defendant must utterly fail, as in that view there can be no conflict of jurisdiction, because it has already appeared that a State court cannot enjoin the process or proceedings of a circuit court.

"Complete jurisdiction of the case, which resulted in the judgment, is conceded; and if it be true that the writ of mandamus is a remedy ancillary to the judgment, and is the proper process to enforce the payment of the same, then there is an end of the argument, as it cannot be contended that a State court can enjoin any such process of a Federal court."

In conclusion, the court held that the circuit court had not lost jurisdiction by the rendition of the primary judgment, and that the writ of mandamus was a writ ancillary to the judgment, and not a new suit, but proper process to enforce satisfaction of its primary judgment.

In the instance before us, the State court had acquired jurisdiction over the association, by service of process upon its duly constituted agents. An execution had been returned no property found. The court by a sworn petition was then advised that this non-resident judgment debtor had no property subject to execution, but that it was in receipt at stated times of dues and premiums upon existing contracts of insurance, and that it had revoked the authority of all of its agents and collectors within the State, and was requiring all such accruing dues to be remitted directly to its home office by the policyholders themselves, and that this method of conducting its business in the State had been resorted to for the purpose of removing its assets beyond the jurisdiction of the State. In this situation, the court was asked to impound and sequester these choses in
75 action, through means of a receiver, that they might be applied to the payment of this judgment.

Manifestly, the action of the court in impounding property of the judgment debtor, which could not be reached by execution, was action auxiliary to the primary suit. The proceeding was not in any sense a new suit or a separate action. That which the court was asked to do, and that which the court did do, was to take a step in aid of the satisfaction of its judgment, and this it did as a proceeding ancillary to the judgment, and by virtue of its previously acquired jurisdiction over the subject-matter of the controversy and of the parties.

Instead of ordering an alias fi. fa., or an attachment, it appointed *it* a receiver, and directed him to take possession of the choses in action which apparently constituted the only property of the debtor within the jurisdiction. This appointment was made without other than constructive notice. How, otherwise, could it be if the averments of the supplemental petition were true? Was the court powerless because the judgment debtor was a foreign corporation, unrepresented by agents and having no property subject to execution?

As we are advised by an opinion subsequently filed by the very learned judge of the State court, that court regarded a summons

upon this supplemental proceeding as wholly unnecessary, because no new cause of action was presented therein and because the judgment debtor was charged with constructive notice of all steps taken in the case, after the original service in the primary action. Aside from any question of the sufficiency of constructive notice where, in the same case, a receiver is applied for, after judgment, and a return of *nulla bona*, as a substitute for an alias execution, or an attachment, or other proper writ of process, we are not prepared to say that if such a supplemental matter be regarded as a new suit or action that the constitutional requirement of due process is infringed if a receiver be appointed before notice. Doubtless the general rule is, that, even after judgment, application for appointment of a receiver should not be entertained without notice. Beach Equity Practice, section 730, and cases cited.

"But, says the author, "the rule requiring notice is not so inflexible as to prevent the court from proceeding in cases where it is impracticable to give legal notice, as in the case of absconding or nonresident defendants, or in case of great emergency demanding the immediate interference of the court."

The ground upon which the court below proceeded was that
76 there was no such vitality remaining in the primary suit as to justify any kind of supplementary proceeding. To quote the figurative, yet forceable, language of Judge Evans, "The whole so-called supplemental proceeding was an attempt to graft a living branch upon a dead stalk." For this reason, said the judge, "the filing of the supplemental petition and the action of the court appointing a receiver thereupon will be treated as nullities." The metaphor as we have already seen is not apt. The jurisdiction of the State court had not been exhausted by the rendition of its judgment, for under well-settled rules of general jurisprudence, it continued for the purpose of enforcing satisfaction of that judgment.

We have not been cited to any decisions of the highest court of Kentucky, nor to any statutory provision which conflicts with the view which Judge Toney, of the Jefferson circuit court, took as to the ancillary powers of his court. Counsel for appellees have cited two decisions as supporting the view of the court below. They are Brown *v.* Van Cleave, 86 Ky. 381, and Meadows *v.* Goff, 90 Ky. 540. Brown *v.* Van Cleave was a proceeding by attachment against a nonresident copartnership, of which it was averred Brown was a member. The property attached was shares of stock belonging to Brown. Brown appeared and denied that he was a member of the firm which had made the notes in suit. This issue was found in Brown's favor. But the court held him liable for a part of the debt in suit, because incurred at a time when he was a member of the firm sued. Judgment went against Brown accordingly. It was further ordered that unless he paid into court, within ten days, an amount sufficient to pay this judgment and costs the attached shares should be sold. Brown complied and paid in the sum necessary to satisfy the judgment against him.

On the day he did this, the plaintiff filed an amended pleading in which he sought to subject Brown's attached shares to the satis-

faction of that part of the debt in suit for which Brown had been held not liable upon the ground that Brown had permitted the firm of which he was not a member to pledge the attached shares for the payment of the firm's debts. The object was to tack this new cause of action on to the old suit, already decided, and thus hold on to the attached property. The Kentucky court of appeals held that this could not be done, as the rights of the parties had been litigated to a final judgment. The court, among other things said:

"After a final judgment had been reached, and after it had been
77 discharged according to the term prescribed by the court, the appellee filed an amended petition, in which he set up a new and distinct cause of action against the appellant. The cause of action thus set up was not designed to aid in effectuating the judgment already rendered, for that judgment had been satisfied; but it was designed to subject the appellant's property to the payment of the remaining portion of the two notes, for the payment of which he, according to the judgment of the court, was not bound."

"It is thus seen that the amendment proposed a new and distinct cause of action and for that reason alone the amendment should have been rejected."

Meadows *v.* Goff is to the same effect. After a judgment in an action of ejectment, a stranger asked leave to appear and be made a party defendant, upon the ground that the land belonged to her and not her husband, who had been sole defendant. The court held she came too late.

We see nothing in either of these cases which militates against the procedure of the State court in the proceedings instituted there in aid of the satisfaction of its judgment. The label affixed to the petition praying an attachment or the appointment of a receiver is of no conclusive significance. The relief sought should determine its nature. It was not thereby sought to amend the original petition nor to tack on to the original cause of action a new and distinct suit, as in Brown *v.* Van Cleave, cited above. The relief was plainly in aid of the judgment already rendered, differing in kind only from an alias execution, a writ of attachment, or a writ of mandamus. A receiver was sought as a means of impounding property of the judgment debtor and applying it to the satisfaction of the judgment rendered. The appointment of a receiver was neither more or less than the seizure of the judgment debtor's property for the satisfaction of the judgment of the court by an equitable attachment.

Aside from the general equity powers of the Jefferson circuit court, under which a receiver might be appointed under circumstances authorizing such action by a court proceeding according to the usual course of a court of equity, there was a statute which expressly granted power to appoint a receiver "on motion of any party to an action" who brings himself within the terms of that law. Section 298, Ky. Codes, Revised, Carroll, 1900, reads as follows:

"On the motion of any party to an action who shows that he has, or probably has, a right to, a lien upon, or an interest in, any property or fund, the right to which is involved in the action, and
78 that the property or fund is in danger of being lost, removed or materially injured, the court, or the judge thereof, during

vacation, may appoint a receiver to take charge of the property or fund during the pendency of the action, and may order and coerce the delivery of it to him. The order of a court, or of the judge thereof, appointing or refusing to appoint a receiver, shall be deemed a final order for the purpose of an appeal to the court of appeals. Provided, that such order shall not be superseded."

Sections 439 and 441, of the same Code, read as follows:

"After an execution of *fieri facias*, directed to the county in which the judgment was rendered, or to the county of the defendant's residence, is returned by the proper officer, either as to the whole or part thereof, in substance, no property found to satisfy the same, the plaintiff in the execution may institute an equitable action for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled, and for subjecting the same to the satisfaction of the judgment; and, in such actions, persons indebted to the defendant, or holding money or property in which he has an interest, or holding evidences or securities for the same, may be also made defendants."

"In such action the plaintiff may have an attachment against the property of the defendant in the execution, similar to the general attachments provided for in chapter three, of title eight, without either the affidavit or bond therein required."

Having, as we conclude, already acquired jurisdiction over the defendant, by service duly served in the original suit, the ruling of the learned judge of the State court was, in effect, that the law of Kentucky did not require that a new subpœna should issue before he could, in aid of the enforcement of the judgment rendered, act upon an application for a receiver, and that the defendant, being already before the court, under primary process, no further notice was necessary as a condition to the seizure of its property to compel satisfaction of its judgment. It may be that in this ruling that court erred, but we are not content to so decide in the absence of some statute more explicitly requiring such new summons or other notice, or some decision of the supreme court of Kentucky in conflict with the decision as to the law of Kentucky made in the very case now under examination.

Whether the decision of Judge Toney was rested upon the general powers of a court of record, having general law and equity jurisdiction, or was based upon the interpretation of sections 298 or 439, it was the decision of a court whose jurisdiction had not been
79 exhausted by the rendition of its judgment, but continued until it should be satisfied for the purpose of the issuance of all proper writs or process in aid of its enforcement. Having jurisdiction through the service of the primary summons, everything subsequently done within the general sphere of its power to compel the satisfaction of its judgment should be held as conclusive when collaterally assailed in the courts of another jurisdiction unless it is impeached for fraud. If the court erred in its construction of the statute or in the exercise of its powers by appointing a receiver without notice, the remedy was by seasonable proceedings in error.

Cornett *v.* Williams, 20 Wall. 226, 250; Laing *v.* Rigney, 160 U. S. 531, 542.

In Elder *v.* Richmond Gold & Silver Mining Co., 58 F. R. the court of appeals for the eighth circuit, speaking by Circuit Judge Caldwell, said:

"The court had jurisdiction of the parties and the subject-matter, and it had the power, and it was its duty, to hear and decide every question of fact and law that arose in the progress of the case, until it was finally disposed of. It was its duty to inquire and decide whether the requirements of the practice act, in the particular mentioned, had been observed. The presumption is that it did inquire, and that it decided the question rightly, and this presumption is of conclusive force as against a collateral attack upon the judgment. But if this, or any other question of law or fact which arose in the progress of the case, was erroneously decided, the jurisdiction of the court, and the validity of its judgment, would not be affected thereby. An erroneous decision does not divest a court of its jurisdiction over the case. Elliott *v.* Piersol, 1 Pet. 328, 340. If it commits errors, they can only be corrected by appropriate appellate procedure in a court which, by law, can review the decision. Bronson *v.* Schulten, 104 U. S. 410. But neither this court nor the circuit court is invested with appellate or supervisory jurisdiction over the State courts, nor can either reverse, vacate or modify their judgment, in cases in which they had jurisdiction of the parties and the subject-matter. Randall *v.* Howard, 2 Black, 585; Nouge *v.* Clapp, 101 U. S. 551; Central Trust Co. *v.* St. Louis, A. & T. R'y Co., 40 F. R. 426. The judgment of June 10, 1882, even if it was erroneous, was not void, and has the same force and effect as if no error had been committed in its rendition."

3. But if we are in error in respect to the law of Kentucky, and that under the law of that State a new writ of summons should have issued as a prerequisite to jurisdiction under the proceedings supplementary to the primary judgment, we are then confronted with the grave question, as to whether, under section 720, Revised Statutes, the court below did not err in issuing the injunction against
80 the receiver of the State court. That section reads as follows:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The position of the court below, and of the counsel for appellee here, is, that if the State court exceeded its jurisdiction, by assuming to appoint a receiver in aid of the enforcement of its own judgment without a new summons or notice, that the proceeding under which its jurisdiction in that respect was invoked is to be regarded as not being a "proceeding" within the meaning of section 720, and that a receiver appointed under such circumstances is not, in any sense, an officer of the State court, and that an injunction against such an interloper is "in no way enjoining a proceeding in a State court."

To so narrow a construction of the term "proceedings in any court of a State," we cannot assent, and no authority has been produced which sanctions any such definition. The supplemental petition filed in the primary suit was an appeal to the supposed power of the court to order any other or further writs or process necessary to compel payment of its judgment. The petition constituted a "proceeding" in court whether we regard it as a new action or as a mere collateral and supplemental pleading. In point of fact the "proceeding" was neither regarded by the State court or by the party filing it, as a new action, but as a collateral and supplemental appeal to the continuing jurisdiction of the court until its judgment should be satisfied; and if the action of the State court is subject to criticism, it is because when its jurisdiction was thus invoked it erred in assuming that it might act upon the constructive notice of the primary suit, and without a new writ of summons or other form of notice.

But, does it follow, because the State court exceeded its jurisdiction by thus appointing a receiver in aid of the enforcement of its own judgment without notice, that a court of the United States, upon the application of the judgment debtor, and in defiance of the injunction which forbid any interference with the receiver in the discharge of his duties, may enjoin that receiver from obeying the order of the court, whose officer he colorably was, or dispossess him from the custody of the property which he had been directed to hold?

There is no pretense of any prior suit involving the same con-
81 troversy in the United States court, nor of any prior possession, constructive or actual, of the *res* which the receiver was ordered to reduce to possession. The injunction of the State court, forbidding interference with its receiver, is met with a counter-injunction forbidding the receiver to proceed with the duties of his appointment and forbidding his interference with the property of the Mutual Reserve Fund Life Association, which the State court had specifically directed him to take possession and custody of. Which court shall the receiver obey? Unless one court or the other shall yield its pretensions nothing remains but an appeal to force. Fortunately, the State court, while justifying its action in an opinion of vigor but commendable courtesy, has directed its receiver to apply to the circuit court to discharge its injunction, and to appeal to this court from any order continuing it in operation.

If there are principles of comity, or of statutory construction, by which so deplorable a conflict between coequal courts of concurrent jurisdiction may be avoided, and the operations of our independent systems of judicature rendered harmonious, it is our highest duty to discover and apply them. "It forms a recognized portion of the duty of this court," said Justice Campbell, in Taylor *v.* Carryl, 20 How. 583, 595, in speaking for the court, "to give preference to such principles and methods of procedure as shall serve to conciliate the distinct and independent tribunals of the State and the Union, so that they may co-operate as harmonious members of a judicial system, coextensive with the United States, and submitting to paramount authority of the same constitution, laws and Federal obligations." Continuing he said: "The decisions of this court that declare

such an aim, and that embody the principles and modes of administration to accomplish it, have gone from the court with authority, and have returned to it, bringing the vigor and strength that is always imparted to magistrates of whatever class, by the approbation and confidence of those submitted to their government."

It is a rule of almost universal application that between courts of the same sovereignty, and concurrent jurisdiction, the court which first acquires jurisdiction of the controversy, or of the *res*, should be suffered by every other court to decide every question within the sphere of the pending cause, and to continue in the possession of the subject-matter of the controversy until every question before it shall be decided, and the *res* discharged from its control.

82 This rule has its foundation, perhaps, in comity, but the fruits of its recognition have been so beneficent, when applied to courts of concurrent jurisdiction, created by different sovereignties, as to justify the conclusion that it is not only a rule of comity, but one of necessity. The cases are numerous which recognize its binding force and illustrate its wide application. No useful purpose will be subserved in making quotations from them. We content ourselves with the citation of a few which are most in point. Peck *v.* Jenness, 7 How. 612; Taylor *v.* Carryl, 20 How. 583; Ableman *v.* Booth, 21 How. 506; Freeman *v.* Howe, 24 How. 450; Tarbles case, 13 Wall. 397; Buck *v.* Colbath, 3 Wall, 334; Covell *v.* Heyman, 111 U. S. 176; Central Bank *v.* Stevens, 169 U. S. 432, 452; Riggs *v.* Johnson County, 6 Wall. 166; Moran *v.* Sturgis, 154 U. S. 256; Shields *v.* Coleman, 157 U. S. 168; American Association *v.* Hurst, 7 C. C. A. 598; Southern Bank *v.* Folsom, 21 C. C. A. 568; Mills *v.* Prov. Life Ins. Co., 100 F. R. 344; Aultman *v.* Brumfield, 102 F. R. 7; Senior *v.* Pierce, 31 F. R. 628; Har. Krader *v.* Wadley, 172 U. S. 148.

The courts of the State and of the United States are as to each other foreign courts. Nevertheless the power sometimes exercised by courts of equity to restrain parties within their jurisdiction from proceeding in a foreign court, does not apply to them, and it has long been recognized that State courts cannot enjoin proceedings in the courts of the United States, nor the latter in the former courts. Story Eq. Juris., sections 899, 900; Central Nat. Bank *v.* Stearns, 169 U. S. 436, 462, 463.

Section 720 originated in 1793, and is a legislative command affirmatively enforcing this rule of comity by expressly prohibiting the enjoining of proceedings in State courts, except when authorized in bankrupt cases. Some cases other than bankruptcy suits have been held not to be within the literalism of the statute. Thus, it has been held that the statute does not prevent a court of the United States from protecting its own prior jurisdiction over the property in controversy. Iron Mountain Railroad Co. *v.* City of Memphis, 37 C. C. A. 410. Nor from enforcing its own judgments in causes removed from the State court. French *v.* Hay, 22 Wall. 250; Dietzsch *v.* Huidekoper, 103 U. S. 494. So it has been held that when the requisite Federal jurisdiction exists, a bill in equity will lie to deprive parties of the benefits of a decree or judgment

obtained by fraud in a State court. Barrow *v.* Hutton, 99 U. S. 80; Arrowsmith *v.* Gleason, 129 U. S. 86, 101; Johnson *v.* Waters, 111 U. S. 640, 667.

83 In Marshall *v.* Holmes, 141 U. S. 589, 599, a bill to annul, on the ground of fraud, judgments rendered by a State court was upheld.

The court, among other things, saying:

"While it cannot require the State court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a State court. It would simply take from him the benefit of judgments obtained by fraud."

It is plain that in all these cases the Federal court was violating no rule of comity, for in every one of the supposed exceptions to the statute the court was either protecting its own prior possession of the *res*, or of the controversy, or enforcing it- own judgment. This is true of a suit for the nullification of a judgment upon the ground of fraud. The relief sought in such a case would be the subject of an independent suit in equity, and, if the requisite diversity of citizenship existed—such a suit could be maintained in a circuit court of the United States, and any injunction against the enforcement of the judgment nullified for fraud would be mere process for the enforcement of its own judgment and operative only through its jurisdiction over the parties thereto.

In passing, however, it may be observed that in none of the cases of this class reported, was any injunction actually granted in the Federal court. In Marshall *v.* Holmes, an injunction was allowed in the State court before removal. This remained in force, for the cause stands after removal just as it did before. Bondurant *v.* Watson, 103 U. S. 281, 287. None of these instances of so-called exceptions made by judicial constructions of the statute apply to the case in hand.

The effort to remove the proceeding under which the receiver was appointed was rightly denied, for, in any view we take of the matter, it must be regarded as a proceeding ancillary to the primary suit and not as an independent suit. Barrow *v.* Hunton, 99 U. S. 80, 85; Marshall *v.* Holmes, 141 U. S. 589, 597. Unless the court below can enjoin the proceeding in the State court and prevent the receiver thus appointed from executing the orders and directions of that court, it is plain that no equitable jurisdiction exists. But it is said that neither the statute nor any rule of comity requires the United

84 States courts to refuse a remedy by injunction against any proceeding under which property is about to be taken without due process of law.

The receiver was armed with the authority of the Jefferson circuit court. He was colorably, at least, its officer, and his action was its action, his possession its possession, though constructive and not

actual. It is not enough for one to say, "This process under which my property is about to be taken is issued without authority, or that the officer who assumes to exercise dominion over my property was appointed by a court which exceeded its jurisdiction in appointing and instructing him." The effect of the appointment of the appellant as receiver, under the terms of the order, already cited, was to place him constructively in possession of the property of the appellee association within the State of Kentucky. To obtain actual possession he had, when enjoined, notified the association debtors to pay their debts to him, and had thus done all that was possible, without instituting suit, to reduce these choses in action to his actual possession.

Is it possible that under such circumstances the receiver may be ousted from its constructive possession and the hand of the State court stayed, while the United States court determines the question, as to whether under the law of Kentucky the State court had the jurisdiction to make the order and take the step complained of? No case has been cited which gives support to this contention. It is not relevant to say that a void judgment is a nullity, and that whenever it is set up as a justification its voidness may be shown? Nor is it relevant to say that the jurisdiction of the court is always a subject of inquiry when a foreign judgment is sued upon.

The question we have to deal with involves no such question, but concerns the power of a United States circuit court in view of section 720, to enjoin a proceeding in a State court of concurrent jurisdiction for the purpose of determining whether or not it had exceeded its jurisdiction in respect to the matter complained of.

A receiver is peculiarly the hand of the court which appoints him. His possession, whether actual or constructive, is but the possession of the court, and when he is dispossessed or enjoined, the court is dispossessed or enjoined. Can it need anything more than the plain unmistakable language of the statute to perceive that such a case is within both its letter and spirit? Is it enough to take a given case out of the statute that the complainant asking an injunction against action under an order, a writ or process from a State court challenges the power of the court to make the order, or issue the writ complained of?

85 It will not do to say that the owner of property taken constructively or actually, or about to be so taken, by invalid order or process of a court of another jurisdiction, is otherwise without remedy. Such an owner may apply for relief to the court under whose authority his property has been seized. Freeman *v.* Howe, 24 How. 450; Covell *v.* Heyman, 111 U. S. 176; American Association *v.* Hurst, 16 U. S. App. 325; Gumbel *v.* Pitkin, 124 U. S. 131; Krippendorf *v.* Hyde, 110 U. S. 276; Lammon *v.* Feusier, 111 U. S. 17. If the officer taking the property exceeds the authority of his writ, he may be sued in any court having jurisdiction in an action of trespass. Buck *v.* Colbath, 3 Wall. 334.

A third remedy consists in the right to sue for the recovery of the property after the hand of the court seizing it has been raised. If the taking was under a proceeding void for want of due process of law, the title of one acquiring it under such an invalid proceeding

would be unavailing. Cooper *v.* Newell, 173 U. S. 555. To prevent such unnecessary conflicts of jurisdiction as that presented on this record, the statute, now section 720, Revised Statutes, was enacted. The burden is upon one who asserts an interpretation of that provision, which would tend to weaken its force and defeat its beneficent purposes. The spirit of the rule of comity between courts prevents interference, not upon any question of ultimate right or wrong, but upon the question as to which jurisdiction had first attached. This rule is clearly and definitely established. Taylor *v.* Carryl, 20 How. 583; Freeman *v.* Howe, 24 How. 450; Kripendorf *v.* Hyde, 110 U. S. 276; Southern Bank *v.* Folsom, 21 C. C. A. 563, and 75 F. R. 929. There may be instances in which the question as to which of two conflicting authorities should prevail, may turn upon priority of *actual* seizure and custody of the property in suit. But the cases in which a distinction between actual and constructive seizure and custody has been observed, have been cases in which the jurisdiction of the United States courts have been exclusive, and not concurrent with the State courts.

Thus, in Taylor *v.* Carryl, 20 How. 583, 601, the facts were that a vessel had been actually seized under an attachment issuing from a State court, and was under order of sale made by the State court—when process issued under a libel filed in the district court of the United States for mariners' wages and supplies. It was held that the libel did not divest the officials of the State court of their authority over the vessel, and that of the two sales made, one by the sheriff and one by the marshal, the sale by the sheriff conveyed the legal title, and the sale by the marshal was inoperative. The
86 decision was expressly put upon the single ground, that while the property levied upon was in the actual possession of one jurisdiction, it should not be taken by an officer acting under another. In Moran *v.* Sturgess, 154 U. S. 256, 276, *et seq.*, the facts were much the same with this distinction; the State court had not made any *actual seizure* of the vessels, though it had appointed a receiver who had not qualified when the vessels were seized by the marshal under libels filed subsequent to the proceedings for appointment of a receiver in the State court. The holding was, first, that the State court had no authority to enforce maritime liens; second, that being without power to enforce such liens it was incapable of displacing them; third, that for this reason actual possession by a State court of the *res* subject to such liens will not be disturbed, but as a State court can only deal with the property subject thereto, when its jurisdiction has determined the admiralty courts may proceed; fourth, in respect of the title of the receiver, the court held that as he had not qualified when the marshal seized the vessels his title, by relation upon qualification thereafter, should not be carried back so as to antidate the marshal's seizure. In respect to this the court said:

"The contention is not only that the title to these vessels vested in the receiver as of July 31st, and that, in such case as this, constructive is the equivalent of actual possession, but that although the receiver did not qualify until after the seizure by the marshal,

he, thereupon, became constructively possessed of the vessels as of July 31st, and the jurisdiction of the district court was thereby ousted. But, if the jurisdiction had attached, it would not be defeated even by the withdrawal of the property for the purpose of the State court, and, moreover, the doctrine of relation has no application. As between two courts of concurrent and co-ordinate jurisdiction, having like jurisdiction over the subject-matter in controversy, the court which first obtains jurisdiction is entitled to retain it without interference, and cannot be deprived of its right to do so, because it may not have first obtained physical possession of the property in dispute. But where the jurisdiction is not concurrent and the subject-matter in litigation in the one is not within the cognizance of the other, while actual, or, even constructive, possession may, for the time being, and in order to avoid unseemly collision, prevent the one from disturbing such possession, yet where there is neither actual nor constructive possession there is no obstacle to proceeding, and action thus taken cannot be invalidated by relation. That doctrine is resorted to only for the advancement of justice, and, under these State statutes, is adopted to defeat fraudulent, unwarranted and unjust dispositions of the debtor's property and to
87 accomplish just and equitable ends. Herring *v.* N. Y., Lake Erie, &c., Railroad, 105 N. Y. 340, 377.

"At the time these libels were filed and the marshal seized the property it had not been developed whether or when the receiver would or might give the security required and enter upon the discharge of his duties, and he had neither actual nor constructive possession."

The case furnishes no reason for drawing any distinction between actual and constructive possession of the choses in action of the Mutual Reserve Fund Life Association. The subject-matter of the litigation was one in respect to which the jurisdiction of the two courts was concurrent. The receiver of the State court had actually qualified and had served notice of his appointment and authority upon the debtors of the mutual association. The receiver was, therefore, in constructive possession of the assets before the interference of the United States court was solicited. The case in this respect falls within the very distinction recognized by the chief justice, when he said:

"As between courts of concurrent and co-ordinate jurisdiction, having like jurisdiction over the subject-matter in controversy, the court which first obtains jurisdiction is entitled to retain it without interference, and cannot be deprived of its right to do so because it may not have first obtained physical possession of the property in dispute."

The rule thus stated is supported in the case of Peck *v.* Jenness, 7 How. 624; Freeman *v.* Howe, 20 How. 450; Covell *v.* Heyman, 111 U. S. 176; Buck *v.* Colbath, 3 Wall. 334.

That the property of a stranger to the proceeding has been taken, will not justify a writ of replevin or any other dispossessory or injunctive proceeding in the court of another jurisdiction, is well set-

ed. Freeman *v.* Howe, Buck *v.* Colbath and Covell *v.* Heyman, ted above.

In American Association *v.* Hurst, 7 C. C. A. 598, the facts were hat the property of a stranger to a writ from a State court was levied n and was about to be sold to satisfy a judgment against another. An injunction was sought from a circuit court of the United States o restrain such taking. The writ was denied below, and the efusal affirmed by this court. Judge Taft, speaking for this court aid:

"The principle is that, in order to preserve the dignity and protect the effectiveness of the process of courts of concurrent 88 jurisdiction, and to avoid unseemly conflicts between them, and between their respective executive officers, no remedy of an injunctive or dispossessory character will be afforded by one court against the acts of the executive officers of the other court, when done under color of an order or process issuing from such other court, because it would have the inconvenient and anomalous effect to stay the proceedings in one court to allow another court to investigate the validity of acts done under such proceedings."

No case has been called to our attention which sanctions the contention of counsel, that the mere fact that the jurisdiction of the State court is challenged will justify the enjoining of one court by another. The State and Federal courts are independent of each other, except in a limited class of cases, when a writ of error will lie from the highest court of a State to the Supreme Court of the United States. They are courts of equal dignity and of concurrent jurisdiction in respect to the subject-matter of this controversy. Neither court has the power to control or coerce the other. If the circuit court of the United States has the power and jurisdiction when diversity of citizenship exists, to enjoin and dispossess a receiver, acting under authority of the Jefferson circuit court, upon a bill averring a defect of jurisdiction, the other must have an equal right upon a case arising presenting similar jurisdictional questions. The power must be reciprocal if it exists. We entirely approve the view expressed by District Judge Love, in Senior *v.* Pierce, 31 F. R. 625, 631, in saying that:

"Inasmuch as the very purpose of non-interference is to prevent a conflict between the two jurisdictions, I can see no difference in the application of the principle whether the question to be decided by the two courts is one of jurisdiction, or of mere property right, the jurisdiction being conceded. The State court must needs decide for itself whether or not the seizure proceeding was illegal. There is no other tribunal with competent authority to decide this question for the State court. If the Federal court may decide the question of the regularity of the seizure and jurisdiction adversely to the State court, and proceed to take the property from its custody by force, why may not the State court reciprocally, in any parallel case, decide the same questions when property is in our custody, and proceed by a writ of replevin to dispossess the marshal? But, assuredly, if the Federal court were in possession by legal process, it would not permit the State court to decide the question of jurisdiction, and wrest the prop-

erty from our control. The only safe and legitimate course for the suitor is to pursue his remedy by some proper ancillary proceeding in the court first obtaining jurisdiction, and take his appeal, if not satisfied, to the final justice of the supreme court of the State,
89 or of the United States, as the case may require. It will not do for the suitor to assume that he cannot obtain justice in one jurisdiction or the other. But at all events, it is infinitely better that injustice should be done and suffered in particular cases than that a course of proceeding should be sustained fraught with all the evils of conflicting judgments and forcible collisions between the two independent jurisdictions."

Inasmuch as no relief whatever can be obtained unless the proceedings in the State court can be enjoined the cause will be remanded with direction to dismiss the bill for want of equity and to dissolve the injunction.

90 And afterwards to wit on January 23rd 1902 a petition to rehear said cause was filed which reads and is as follows:

Petition for Rehearing.

91 United States Circuit Court of Appeals, Sixth Circuit.

JAMES S. PHELPS ET AL., Appellants,
vs.
MUTUAL RESERVE FUND LIFE ASSOCIATION, Appellee. } No. 955.

Appeal from the circuit court of the United States for the district of Kentucky.

Petition for a rehearing.

We are extremely reluctant to ask a court that considers its cases so thoroughly as this court a rehearing of any question, and, notwithstanding our confidence in our position, would not now ask it except for the peculiarly prejudicial position in which this court's judgment leaves us.

Under *section 5, act of March* 3, 1891, appellee, complainant below, has a right of appeal to the supreme court, because the jurisdiction of the circuit court is in issue, and the case involves the construction and application of the Federal Constitution forbidding denial
92 of due process; but if the supreme court reverse the decree which the circuit court must enter in accordance with the principles announced by this court, dismissing our bill, we should nevertheless have been deprived of the fruits of the judgment of the supreme court because pending appeal defendants, acting under the authority of the State judge, would have demoralized our policyholders and ruined our business. On the other hand, should this court grant a rehearing and certify the questions involved, as it may do under authority of *Gableman vs. Peoria, &c., Co.*, 101 *Fed. R.* 1; *S. C.* 179 *U. S.* 335, the ends of justice would, as far as practicable, be attained.

I.

The first point determined against us is thus stated by this court, speaking of State court's decision:

"Having appeared for the purpose of challenging the jurisdiction of the court, the decision of the court upon that issue is conclusive until annulled or reversed by some court having jurisdiction to revise and correct that error."

No authority is cited in support of this proposition. If the State court's decision turn out erroneous, the decision of this court
93 is that the State court acting without jurisdiction has precluded appellee by a decision that it had jurisdiction. On this proposition the supreme court says:

"The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground or what we consider as intended, that the service be set aside; nor, when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when, being urged, it is overruled and the defendant is thereby compelled to answer. He is not considered as abandoning his objection, because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality that the objection is deemed to be waived."

This was said in a case where process was served beyond the territorial bailiwick of the sheriff, and defendant appeared specially (as did appellee) to quash the service. *Harkness vs. Hyde*, 98 *U. S.* 478.

Harkness vs. Hyde has been repeatedly reaffirmed; see *Sou. Pac. Co. vs. Denton*, 146 *U. S.* 202; *Mex. Cent. R. Co. vs. Pinkney*, 149 *U. S.* 209; *Goldey vs. Morning News*, 156 *U. S.* 518, *etc.*

94 In *York vs. Texas*, 137 *U. S.* 15, the court, sustaining a Texas statute imposing the penalty of submitting to the jurisdiction upon one unsuccessfully questioning the jurisdiction of the State court, said, nevertheless:

"It must be conceded that such statutes contravene the established rule elsewhere—a rule which also obtained in Texas at an earlier day, to wit, that an appearance which, as expressed, is solely to challenge the jurisdiction is not a general appearance in the cause, and does not waive the illegality of the service or submit the party to the jurisdiction of the court. *Harkness vs. Hyde*, 98 *U. S.* 476, *etc.*

"The difference between the present rule in Texas and elsewhere is simply this: Elsewhere the defendant may obtain the judgment of the court upon the sufficiency of the service without submitting himself to its jurisdiction. In Texas, by its statute, if he ask the court to determine any question, even that of service, he submits himself wholly to its jurisdiction. Elsewhere he gets an opinion of the court before deciding on his own action. In Texas he takes all

the risk himself. If the service be in fact insufficient, all subsequent proceedings, including the formal entry of judgment, are void; if sufficient they are valid," etc.

Accordingly, with great diffidence, we suggest that the court has overlooked the authorities controlling on this question in concluding that appellee waived the State court's error in appearing specially to challenge its jurisdiction.

95 The principle of *Harkness vs. Hyde* was reaffirmed in an excellent opinion in *C. O. & S. W. R. R. Co. vs. Heath's Adm'r*, 87 *Ky.* 659, where the court, after citing *Harkness vs. Hyde*, said that so far from the special appearance of defendant to quash the service, being a waiver of the question of jurisdiction, it was the duty of the defendant to apprise the court of the impropriety of the service.

The *Heath case* was expressly reaffirmed in *N. N. & M. V. Co. vs. Thomas*, 96 *Ky.* 613; and the same doctrine again declared in *Sun Mut. Ins. Co. vs. Crist*, 19 *Ky. L. R.* 306 (March 26, 1897).

There is, therefore, no foundation whatever in Kentucky authorities for the position of the State judge on this question.

II.

In reversing, this court rejects the circuit court's construction of Kentucky statutes, and adopts the State court's. It is not asserted that the State court's proceeding is supported by any precedent. No authority is cited for it by the State court or appellants' counsel, and the ground upon which it is sustained is not clear.

Riggs vs. Johnson County is no authority upon the construction of *sec. 298 or 439, Kentucky Code.* The proposition, there announced, that jurisdiction does not end with judgment, but continues

96 until execution, is not questioned by appellee. We simply contend that such "execution" is governed by Kentucky law, and the procedure here adopted is not thereby authorized.

Sec. 298 simply authorized an interlocutory order appointing a receiver *before judgment;* such receivership is no part of the process of execution of a judgment.

Sec. 439, whether the action it requires to be *instituted* be ancillary or not, *certainly requires process.* This follows not only from the requirement of "*instituting*" an action, but from *sec. 70*, providing: "An action upon a return of no property found, pursuant to sec. 439, must be brought in the county in which the judgment is rendered, or in which the defendant resides, or is summoned."

If the action may be brought in a county different from that wherein the judgment is rendered, is it possible that it may be without summons? And if this were possible, what disposition is to be made of the concluding words "or is *summoned*"? What is the meaning of providing for instituting an action in the county where the defendant "*is summoned*" if *summons* is not contemplated? With great deference we submit that no instance can be found of record where any Kentucky court ever previously decided,

97 or any Kentucky lawyer ever insisted in a Kentucky court that a summons was not required in an action under *sec. 439.*

If required by Kentucky statute, *then due process of law requires it*, under supreme court decisions.

Not only is summons required in every action begun in Kentucky, but it is even required on every amended petition filed *before judgment* where a new cause of action is asserted; *see Supplemental Brief, p. 5, etc.*, and Kentucky cases reviewed. *Lang vs. Rigney*, 160 *U. S.* 531, 542, construing the laws of New Jersey, is, therefore, inapplicable.

This court says (*p.* 10):

"This appointment was made without other than constructive notice. * * * Was the court powerless because the defendant debtor was a foreign corporation," *etc.?*

There was no "constructive" notice; there was no notice at all. There was no process. "Constructive" process is perfectly defined in Kentucky statutes; see *Code, title IV, chap. II, art. II*, entitled "Constructive service," beginning *sec. 57*.

Sec. 60 provides when one is deemed "constructively summond." Tested by these statutes appellee was never "constructively summoned." Had even an attempt been made at constructive
98 service, appellee might have tested its regularity, or, had a summons been issued in an action instituted under *sec 439*, appellee might have appeared specially to question the court's jurisdiction, as held in *Harkness vs. Hyde supra*. But when no process is taken, appellee cannot appear at all, except voluntarily. Any appearance would have been voluntary, and have waived objection to jurisdiction. In short, upon the doctrine invoked, the State court by assuming to act without process, might obtain jurisdiction to determine the interests of all non-residents.

In *Pennoyer vs. Neff* the court said that the law presumed opportunity in a non-resident to obtain notice under *constructive process*, but no court previously to the action of the State court in this case has ever held the presumption of notice when there was no process.

III.

We shall not inflict a reargument of the questions involved in the construction of *sec. 720 R. S. U. S.*, but submit that their importance, as is recognized in the elaborate and learned opinion of this court in this case, is such as to require final settlement by the final arbiter, the Supreme Court. We earnestly appeal to this
99 court to certify to that court the question of the court's jurisdiction, and the application of the fourteenth amendment requiring due process; or if this court *be advised to the contrary*, that it in its mandate direct the circuit court, instead of dissolving the injunction by interlocutory order, to dismiss the bill, as is authorized by *Bissell vs. Goshen, etc.*, 72 *Fed. R.* 545, *and Smith vs. Vulcan Iron Works*, 165 *U. S.* 518, and we now avow that we are ready to unite with appellants in a request to the supreme court to advance the hearing.

With great deference we submit this petition.

PIRTLE & TRABUE, *Of Counsel.*

GEO. BURNHAM, JR.,
SEWELL T. TYNG,
WILLIAM D. GUTHRIE,
Counsel.

Certificate.

Edmund F. Trabue certifies that he has from the inception of this case been of counsel for appellee in the circuit court and in this court, and that in his opinion this petition is well founded in point of law, and further certifies that it is not filed or interposed for delay.

EDMUND F. TRABUE.

100 And afterwards to wit on February 4th 1902, a decree on petition to rehear was rendered in said cause which is in the words and figures as follows:

Decree on Rehearing.

101 United States Circuit Court of Appeals for the Sixth Circuit.

JAMES S. PHELPS & THE FIDELITY TRUST & SAFETY Vault Co.
v.
MUTUAL RESERVE FUND LIFE ASSOCIATION. } No. 955.

Appeal from the circuit court of the United States for the western district of Kentucky.

This cause came on to be heard on a petition for rehearing.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court, in this cause be and the same is hereby reversed with costs and the cause is remanded to said court with directions to dismiss the bill of complaint.

102 And on February 5th 1902, a petition for appeal was filed in said cause which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

JAMES S. PHELPS and FIDELITY TRUST & SAFETY Vault Company, Appellants,
vs.
MUTUAL RESERVE FUND LIFE ASSOCIATION, Appellee. } # 995. Petition for Appeal.

The above-named Mutual Reserve Fund Life Association conceiving itself aggrieved by the judgment made and entered in the above-entitled cause, on the 4th day of February, 1902, wherein it is adjudged that the decree of the circuit court of the United States for

the western district of Kentucky be reversed and petitioner's bill of complaint be dismissed, presents herewith its assignment of errors, and prays an appeal from said judgment of the United States circuit court of appeals to the Supreme Court of the United States, and that the injunction granted by the circuit court aforesaid be continued in force pending the consideration and determinat' by the United States Supreme Court of said appeal.

EDMUND F. TRABUE,
Counsel for the Appellant, Mutual Reserve Fund Life Association.

And afterwards on the same day to wit on February 5th 1902, an order granting appeal was entered which reads and is as follows:

103 United States Circuit Court of Appeals for the Sixth Circuit.

JAMES S. PHELPS & FIDELITY TRUST & SAFETY VAULT CO., Appellants,
vs.
MUTUAL RESERVE FUND LIFE ASS'N, Appellee. } # 955.

The appeal prayed by the Mutual Reserve Fund Life Association in this case is hereby allowed.

It is ordered that the injunction granted herein by the circuit court of the United States for the western district of Kentucky be continued in full force pending the determination of this appeal by the Supreme Court of the United States, upon the said Mutual Reserve Fund Life Association executing a bond in the sum of four thousand seven hundred and twenty ($4720) dollars, to James S. Phelps and The Fidelity Trust & Safety Vault Co., appellees; said bond to be conditioned that the said Mutual Reserve Fund Life Association shall prosecute its appeal to effect, and if it fail to make said appeal good, shall answer to said appellees for the amount of the judgment enjoined by the order of the circuit court of the United States aforesaid, and all damages and costs.

104 And afterwards to wit on February 5th 1902, assignments of error were filed in said cause which read and are as follows:

105 Supreme Court of the United States.

MUTUAL RESERVE FUND LIFE ASSOCIATION, Appellant,
vs.
JAMES S. PHELPS and FIDELITY TRUST & SAFETY VAULT COMPANY, Appellee.

Afterward, to wit; on the 4th day of February, 1902, at the Oct. term for 1901 of the Supreme Court, at the Capitol in the city of Washington, District of Columbia, comes the said Mutual Reserve Fund Life Association, by Edmund F. Trabue, its counsel, and says that in the record of proceedings in the above-entitled matter in the

United States circuit court of appeals for the sixth circuit, there is manifest error in this, to wit:

I. In the decision of said court of appeals to the effect that the circuit court of the United States for the district of Kentucky was deprived of jurisdiction of the suit of this petitioner by the provisions of section 720 of the Revised Statutes of the United States.

II. In the decision of the said court of appeals that said section 720 of said Revised Statutes forbade said circuit court of the United States to issue the injunction which was granted by said court in said suit wherein this petitioner was complainant and James S. Phelps and Fidelity Trust & Safety Vault Company were defendants.

III. In the decision of said court of appeals that this petitioner having appeared in the Jefferson circuit court, a State court of the State of Kentucky, in the action instituted in the said court against it, wherein the said James S. Phelps was plaintiff and appellant, de-
fendant, for the purpose of challenging said State court's juris-
106 diction, the decision of said State court that it had jurisdiction of said action was conclusive of its jurisdiction to render the judgment which it assumed to render against appellant May 19, 1900.

IV. In the decision of said court of appeals to the effect that the said State court had jurisdiction in said action on the so-called amended and supplemental petition, which said Phelps assumed to file therein August 4, 1900, to appoint the receiver which it therein assumed to appoint when no summons or other process had ever issued on said so-called amended and supplemental petition.

V. In the decision of said court of appeals that the so-called order of the State court assuming to appoint the receiver aforesaid was a "proceeding" within the intent and meaning of section 720 of said Revised Statutes, and that the so-called receiver was an officer of the State court within the meaning and intent of said section of said statutes, even if, and although said State court should have been without jurisdiction to make the said order appointing said receiver.

VI. In the decision of said court of appeals in reversing the decree of said circuit court granting injunction and directing the said circuit court to dismiss appellant's bill of complaint;

Wherefore the said Mutual Reserve Fund Life Association prays that the judgment of the said United States circuit court of appeals for the sixth circuit be reversed and that the said court of appeals be ordered to set aside its judgment now appealed from and enter a judgment affirming the aforesaid decree of the circuit court of the United States for the western district of Kentucky.

EDMUND F. TRABUE,
Counsel for Appellant.

107 And afterwards to wit on February 7th 1902, bond on appeal was filed which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

JAMES S. PHELPS and FIDELITY TRUST & SAFETY VAULT Company
vs.
MUTUAL RESERVE FUND LIFE ASSOCIATION. } # 955.

Know all men by these presents, that the Mutual Reserve Fund Life Association, a corporation, as principal, and the Fidelity & Deposit Company, of Maryland, a corporation, as surety, are held and firmly bound unto the appellees, James S. Phelps and Fidelity Trust & Safety Vault Company, in case # 955 United States circuit court of appeals for the sixth circuit, their executors, administrators, and assigns, in the sum of $4720; for the payment thereof well and truly to be made they bind themselves, their successors, executors and administrators jointly and severally by these presents.

Done this 4th day of February, 1902.

Whereas, the above-named Mutual Reserve Fund Life Association has prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered by said United States circuit court of appeals for the sixth circuit in the above-entitled case.

Now, therefore, the condition of th. obligation is such that if the said appellant, Mutual Reserve Fund Life Association shall prosecute said appeal to effect, and if it fail to make said appeal good, shall answer to said appellees for the amount of the judgment enjoined by the order of the circuit court of the United States afore-
108 said, and all damages and costs, then this obligation shall be void, otherwise shall be and remain in full force and virtue.

MUTUAL RESERVE FUND LIFE ASSOCIATION,
By EDMUND F. TRABUE, *Attorney.*
FIDELITY & DEPOSIT CO. OF MD.,
By SPENCER M. JONES, *Res. Vice-Pres.*,
By JOHN P. RYAN, *Res. Ass't Sec'y.* [SEAL.]

Accepted and approved:
HORACE H. LURTON,
Presiding Judge, Court of Appeals.

And afterwards to wit on February 4th 1902, a citation was filed in said cause which reads and is as follows:

Citation.

109 Case No. 955.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to James S. Phelps and the Fidelity Trust and Safety Vault Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the Capitol, in the city of Washington, District of Columbia, within thirty days from

the date of this writ, pursuant to an appeal filed in the clerk's office of the United States circuit court of appeals for the sixth circuit, wherein The Mutual Reserve Fund Life Association is appellant, and you are appellees, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 4th day of February, A. D. 1902, and of the Independence of the United States one hundred and twenty-sixth.

HORACE H. LURTON,
Presiding Judge of the United States Circuit Court of Appeals for the Sixth Circuit.

—— ——, *Clerk.*

Service of the foregoing citation accepted.

BENJAMIN F. WASHER,
Counsel for James S. Phelps, Fidelity Trust & Safety Vault Company.

[Endorsed:] Citation Filed Feb. 11 1902 Frank O. Loveland, clerk.

110 And afterwards to wit on March 3rd 1902, an order was entered in said cause in said court which reads *as* is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

JAMES S. PHELPS ET AL.
vs.
MUTUAL RESERVE FUND LIFE ASSOCIATION.

It appearing that under misapprehension the appellant omitted to file certain assignments of error in the decision, or in the judgment of this court and that such assignments might be regarded as important to a complete review by the Supreme Court, of the judgment of this court;

Therefore, it is ordered that said assignments of error be filed *nunc pro tunc* as of the 5th day of February, 1902, the time of filing appellant's petition for appeal.

111 And afterwards to wit on March 3rd, 1902, the following assignments of error were filed:

The Supreme Court of the United States.

MUTUAL RESERVE FUND LIFE ASSOCIATION, Appellant,
vs.
JAMES S. PHELPS and FIDELITY TRUST & SAFETY VAULT COMPANY, Appellees.

Assignments of Error.

Appellant, by Edmund F. Trabue, its counsel, says that in the record of proceedings in the above-entitled matter in the United States circuit court of appeals for the sixth circuit, there is manifest error in this, to wit:

In the decision of said court of appeals that the State court mentioned in its decision, had jurisdiction to appoint the receiver in question, when no summons or other process had been issued on the so-called amended and supplemental petition; and in failing and declining to decide that the said State court in appointing the said receiver, when no summons or other process had been issued on the so-called amended and supplemental petition, did take the property of appellant, Mutual Reserve Fund Life Association, without due process of law and in violation of the 14th amendment of the Constitution of the United States.

That there is also manifest error in this, to wit:

In said court of appeals failing to hold according to the insistence of said appellant, Mutual Reserve Fund Life Association, that section 720 of the Revised Statutes of the United States as construed by that court was in conflict with the 14th amendment to the
112 Constitution of the United States, forbidding the State court to take said appellant's property without due process of law.

Also manifest error in this, to wit:

In said court of appeals failing to hold according to the insistence of the said appellant, that said section 720 of the Revised Statutes aforesaid as construed by said court of appeals was in conflict with the 14th amendment of the Constitution of the United States forbidding said State court to take said appellant's property without due process of law, as, and inasmuch as an injunction issued by the United States circuit court forbidden by said section 720 of said statutes as construed by said court of appeals afforded said appellant the only adequate and effectual remedy of enforcing said prohibition made by the said 14th amendment, and the only adequate and effectual remedy to prevent said State court's taking said appellant's property without due process of law.

Wherefore, said appellant prays, as heretofore prayed, that the judgment of said United States circuit court of appeals be reversed and the said court of appeals be ordered to set aside its judgment now appealed from and enter a judgment affirming the decree made in this suit by the circuit court of the United States for the western district of Kentucky.

EDMUND F. TRABUE,
Counsel for Appellant,
Mutual Reserve Fund Life Association.

113 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record in the case of Mutual Reserve Fund Life Association *vs.* James S. Phelps and Fidelity Trust & Safety Vault Co., No. 955, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said court, at the city of Cincinnati, Ohio, this 3d day of March, A. D. 1902.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: File No. 18,437. U. S. C. C. of appeals, 6th circuit. Term No. 263. Mutual Reserve Fund Life Association, appellant, *vs.* James S. Phelps and Fidelity Trust & Safety Vault Company. Filed March 5th, 1902.